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Race Relations Law Reporter

A Complete, Impartial Presentation of Basic Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

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Recent Developments . . . A Summary

Education

Prince Edward County, *Virginia*, was told to make a prompt and reasonable start toward the elimination of racial discrimination in school admission policies "without further delay" (p. 1119). In again remanding one of the original *School Segregation Cases* to a federal district court, the Court of Appeals for the Fourth Circuit quoted approvingly the Fifth Circuit's opinion in a Texas school case to the effect that "plaintiffs were entitled to have the school board 'acting promptly, and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration. . . .'" Also in *Virginia*, in a suit brought against the state Pupil Placement Board, a federal district court issued a temporary restraining order against the use of registration provisions of the Pupil Placement Act as requirements for admission to schools (p. 1121).

In *Arkansas* an attempt to obtain an injunction against military commanders of troops carrying out the order of the President concerning an "obstruction to justice" at the Little Rock high school was unsuccessful in the federal district court (p. 1099). The court stated that there was "no substantial question" as to the constitutionality of the President's action. This case is on appeal to the Court of Appeals for the Eighth Circuit (p. 1101). (See also the *Florida* legislative resolution, p. 1171, and the memorandum of the *Georgia* Attorney General, p. 1206.) Several Negro ministers of religion in *Arkansas* sought to obtain a declaration of the unconstitutionality of four 1957 Arkansas acts relating to registration and reports of contributions by organizations (p. 1103). The suit was brought against Governor Faubus and other members of the State Sovereignty Commission. The three-judge federal district court ordered the proceedings stayed pending a ruling on the interpretation and constitutionality of the statutes by state courts of Arkansas.

A federal district court in *Kentucky* which had ordered the desegregation of schools in Fulton at the beginning of the 1957 school year, modified the order to require integration by the beginning of the 1958-59 term (p. 1111). No definite time for desegregation was fixed by a federal court in *Texas* in ordering the admission of Negro pupils to Houston schools without regard to race "with all deliberate speed" (p. 1114). The United States Supreme Court declined to review the decision of the *Florida* Supreme Court which had refused, on grounds of possible violence, to order the admission of a Negro to the school of law of the state university (p. 1093). The possibility of relief in the federal district court is suggested in the denial of certiorari in this case.

The state Board of Education of *Tennessee* has adopted a resolution providing for the use of "selective devices" in admission to state colleges and universities under its control which make no distinction as to race or color (p. 1176). *Florida* has provided for the closing of public schools at which federal military forces are employed (p. 1149). El Reno, *Oklahoma*, has adopted a nondiscrimination policy for admissions to its public schools (p. 1175).

Employment

It is not necessary, the *United States* Supreme Court has again held, that Negro employees of railroads who seek relief from alleged discriminatory representation by unions invoke the assistance of the National Railroad Adjustment Board (p. 1093). The court held that the Board has no jurisdiction to act to protect the employees in such a situation. Racial discrimination in admission to membership by railway labor unions is not prohibited by the *federal* Railway Labor Act, a federal district court in Ohio has held (p. 1128), and the certification of such a discriminating union does not constitute it a federal agency. This holding was in a case brought by Negro firemen of several southern railroads against one of the railway Brotherhoods seeking admission to the union. *Wisconsin* has amended its "Fair Employment Code" to provide enforcement procedures in racial discrimination cases which had previously been held not available by

the state supreme court (p. 1154). Objections to a representation election under the *federal* Taft-Hartley Act held in a North Carolina plant, were brought by a union on the basis that the employer had appealed to racial prejudice in attempting to influence the election (p. 1176). The NLRB declined to vacate the determination which had been made. The fourth annual report of the President's Committee on Government Contracts is set out at p. 1184.

Housing

A case involving alleged racial discrimination in public housing facilities in Savannah, *Georgia*, has been dismissed by the federal district court to which it had been returned for trial on the merits (p. 1122). The court found that the only remaining plaintiff in the case was not entitled to preferential assignment of housing. *Massachusetts* has enacted a statute to make unlawful discrimination on the basis of race or other factors in the renting or leasing of "publicly-assisted housing" (p. 1155); and *Minnesota* has created a commission to investigate discrimination in the acquisition or use of housing accommodations (p. 1157). The *New York* State Commission Against Discrimination, on the basis of a complaint filed by a Negro, ordered the owners of an apartment building to cease discrimination on the basis of race (p. 1190). The apartment project was built with money obtained through a mortgage insured by the Federal Housing Administration and thus came within the statutory definition of "publicly-assisted housing."

NAACP

The Committee on Law Reform and Racial Activities of the *Virginia* General Assembly has investigated activities of the NAACP in the conduct of school integration cases. The report of the committee (p. 1159) makes recommendations for further investigations into litigation activities and of school texts. The Little Rock, *Arkansas*, ordinance which requires the registration and filing of information by certain organizations is reproduced at p. 1158. It has been reported in the press that action has been taken against officers of the local NAACP chapter under this ordinance.

Public Accommodations

Illinois has amended its "civil rights law" so as to broaden its application to discrimination in places of public accommodation to additional facilities (p. 1151); *Chicago* has also enacted an ordinance prohibiting discrimination in places of public accommodation (p. 1152). The appeal of a suit in a *Colorado* state court, brought to recover damages for a denial of accommodations at a swimming pool on the basis of race, was dismissed by the state supreme court (p. 1124) on procedural grounds. The *Michigan* Attorney General has stated that the state's "civil rights law" is not applicable to privately-operated nursing homes (p. 1203).

Other Developments

The *Virginia* supreme court has reversed, because of a defect in the warrant, the conviction of a white woman for having violated that state's statute prohibiting interracial seating at public meetings (p. 1126). Jurisdiction over, and the tort liability of, Indian tribes and individual Indians were involved in cases decided by the *United States* Court of Appeals for the Fourth Circuit (p. 1137) and by the *North Dakota* Supreme Court (p. 1141). The Supreme Court of *Colorado* held invalid a racially-restrictive covenant with a forfeiture provision affecting real property in that state (p. 1134).

Reference

Requirements for exhaustion of state judicial remedies and the doctrine of equitable abstention as prerequisites to the exercise of federal jurisdiction are treated in the backgound study in this issue (p. 1215). This is another in the series of studies of limitations on the exercise of federal judicial power. A cumulative index, on a topical and geographical arrangement, of materials in Volumes I and II of the REPORTER appears at p. 1249. A cumulative table of cases for the two volumes appears at p. 1233. For the convenience of those subscribers who wish to bind the six issues of Volume II, a title page is included following the index.

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UNITED STATES SUPREME COURT

EDUCATION
Colleges and Universities—Florida

The State of FLORIDA ex rel. Virgil D. HAWKINS v. The BOARD OF CONTROL et al.

United States Supreme Court, October 14, 1957, ... U.S. ....., 78 S.Ct. 20.

SUMMARY: In an action which had been commenced in 1949, a Negro sought by a writ of mandamus to require his admission to the school of law of the University of Florida. The Florida Supreme Court, in 1952, dismissed the action. That decision was reversed and remanded by the United States Supreme Court for reconsideration after the initial decision in the *School Segregation Cases*. 347 U.S. 971, 1 Race Rel. L. Rep. 13 (1954). On the remand, the Supreme Court of Florida, in effect, continued the case pending findings on questions of capacity, plant and other "conditions that now prevail" at the University of Florida School of Law. 83 So.2d 20, 1 Race Rel. L. Rep. 89 (1955). The applicant petitioned the United States Supreme Court to review this action. The Supreme Court refused such review but entered a new order in the case, after recalling and vacating its prior order. The new order stated that the factors of possible delay in applying the initial decision in the *School Segregation Cases*, recognized in the second "implementation" decision, were not involved in and not applicable to graduate professional schools. The court stated that the applicant was entitled to "prompt admission." 350 U.S. 413, 1 Race Rel. L. Rep. 297 (1956). The applicant then moved in the Florida Supreme Court for a peremptory writ of mandamus to require his immediate admission to the school of law. That court, two justices concurring specially and two dissenting, held that it would refuse to grant the writ at the present time in the exercise of its judicial discretion. The court found that the admission of a Negro to the University of Florida School of Law at this time would lead to "violence in university communities and a critical disruption of the university system." One justice concurred specially in the court's decision on grounds that the United States Supreme Court did not have before it the testimony regarding possible violence following the admission of a Negro to the university and should have an opportunity to consider that testimony. Two justices dissented on grounds that the mandate of the United States Supreme Court should be obeyed. 93 So. 2d 354, 2 Race Rel. L. Rep. 358 (1957). Hawkins petitioned the United States Supreme Court for a writ of certiorari to the Florida Supreme Court to review this action. In refusing to grant the writ, the Supreme Court, in a Per Curiam opinion, stated:

"Petition for writ of certiorari to the Supreme Court of Florida denied without prejudice to the petitioner seeking relief in an appropriate United States District Court."

EMPLOYMENT
Labor Unions—Federal Statutes

J. D. CONLEY et al. v. Pat J. GIBSON et al.

United States Supreme Court, November 18, 1957, No. 7, ... U.S. ....., 78 S.Ct. 99.

SUMMARY: Negro employees of railway companies in Texas who were members of a union local composed solely of Negroes brought an action in federal district court under the Rail-

way Labor Act against an "all white" local, its officials, and the parent Brotherhood of Railway Clerks. The employees sought a declaratory judgment and injunctive relief against required membership in a segregated local and alleged discrimination based on race or color in the negotiation and administration of collective bargaining agreements, for which the "white" union was agent. The district court dismissed the action for lack of jurisdiction, finding that there was no allegation that the collective bargaining agent was improperly designated or that the agreements negotiated were illegal. 138 F.Supp. 60, 1 Race Rel. L. Rep. 556 (S.D. Tex. 1955). The Court of Appeals for the Fifth Circuit affirmed in a per curiam order without opinion, citing cases which hold that primary jurisdiction of disputes under the Railway Labor Act is vested in the Railroad Adjustment Board. 229 F.2d 436 (1956). The United States Supreme Court granted certiorari. 352 U.S. 818 (1956). The Supreme Court reversed and remanded the case, holding that the Adjustment Board has no power under the act to protect employees from discrimination, such as was here alleged, among unions or employees as distinguished from disputes between railroads and employee representatives.

MR. JUSTICE BLACK delivered the opinion of the Court:

Once again Negro employees are here under the Railway Labor Act [1] asking that their collective bargaining agent be compelled to represent them fairly. In a series of cases beginning with Steele v. Louisville & Nashville R. Co., 323 U.S. 192, this Court has emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and has held that the courts have power to protect employees against such invidious discrimination.[2]

[*Facts*]

This class suit was brought in a Federal District Court in Texas by certain Negro members of the Brotherhood of Railway and Steamship Clerks, petitioners here, on behalf of themselves and other Negro employees similarly situated against the Brotherhood, its Local Union No. 28 and certain officers of both. In summary, the complaint made the following allegations relevant to our decision: Petitioners were employees of the Texas and New Orleans Railroad at its Houston Freight House. Local 28 of the Brotherhood was the designated bargaining agent under the Railway Labor Act for the bargaining unit to which petitioners belonged. A contract existed between the Union and the Railroad which gave the employees in the bargaining unit certain protection from discharge and loss of seniority. In May 1954, the Railroad purported to abolish 45 jobs held by petitioners or other Negroes all of whom were either discharged or demoted. In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority. Despite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees. The complaint then went on to allege that the Union had failed in general to represent Negro employees equally and in good faith. It charged that such discrimination constituted a violation of petitioners' right under the Railway Labor Act to fair representation from their bargaining agent. And it concluded by asking for relief in the nature of declaratory judgment, injunction and damages.

The respondents appeared and moved to dismiss the complaint on several grounds: (1) the National Railroad Adjustment Board had exclusive jurisdiction over the controversy; (2) the Texas and New Orleans Railroad, which had not been joined, was an indispensable party defendant; and (3) the complaint failed to state a claim upon which relief could be given. The District Court granted the motion to dismiss holding that Congress had given the Adjustment Board exclusive jurisdiction over the controversy. The Court of Appeals for the Fifth Circuit, apparently relying on the same ground, affirmed. 229 F. 2d 436. Since the case raised an important

1. 44 Stat. 577, as amended, 45 U.S.C. § 151 et seq.
2. Tunstall v. Brotherhood of Locomotive Firemen & Enginemen 323 U.S. 210; Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768. Cf. Wallace Corp. v. Labor Board, 323 U.S. 248; Syres v. Oil Workers International Union, 350 U.S. 892.

question concerning the protection of employee rights under the Railway Labor Act we granted certiorari. 352 U.S. 818.

[*Dismissal Was Error*]

We hold that it was error for the courts below to dismiss the complaint for lack of jurisdiction. They took the position that § 3 First (i) of the Railway Labor Act conferred exclusive jurisdiction on the Adjustment Board because the case, in their view, involved the interpretation and application of the collective bargaining agreement. But § 3 First (i) by its own terms applies only to "disputes between an employee or group of employees and a carrier or carriers."[3] This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining.[4] The Adjustment Board has no power under § 3 First (i) or any other provision of the Act to protect them from such discrimination. Furthermore, the contract between the Brotherhood and the Railroad will be, at most, only incidentally involved in resolving this controversy between petitioners and their bargaining agent.

[*Other Grounds Considered*]

Although the District Court did not pass on the other reasons advanced for dismissal of the complaint we think it timely and proper for us to consider them here. They have been briefed and argued by both parties and the respondents urge that the decision below be upheld, if necessary, on these other grounds.

As in the courts below, respondents contend that the Texas and New Orleans Railroad Company is an indispensable party which the petitioners have failed to join as a defendant. On the basis of the allegations made in the complaint and the relief demanded by petitioners we believe that contention is unjustifiable. We cannot see how the Railroad's rights or interests will be affected by this action to enforce the duty of the bargaining representative to represent petitioners fairly. This is not a suit, directly or indirectly, against the Railroad. No relief is asked from it and there is no prospect that any will, or can be granted which will bind it. If an issue does develop which necessitates joining the Railroad either it or the respondents will then have an adequate opportunity to request joinder.

[*Complaint Sufficient*]

Turning to respondent's final ground, we hold that under the general principles laid down in the Steele, Graham, and Howard cases the complaint adequately set forth a claim upon which relief could be granted. In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[5] Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. This Court squarely held in Steele and subsequent cases that discrimination in representation because of race is prohibited by the Railway Labor Act. The bargaining representative's duty not to draw "irrelevant and invidious"[6] distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day to day adjustments in the contract

3. In full, § 3 First (i) reads:
"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the dispute." 48 Stat. 1191, 45 U. S. C. § 153 First (i).

4. For this reason the decision in Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, is not applicable here. The courts below also relied on Hayes v. Union Pacific R. Co., 184 F. 2d 337, cert. denied, 340 U.S. 942, but for the reasons set forth in the text we believe that case was decided incorrectly.

5. See, e. g. Leimer v. State Mutual Life Assur. Co., 108 F. 2d 302; Dioguardi v. Durning, 139 F. 2d 774; Continental Collieries v. Shober, 130 F. 2d 631.

6. Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 203.

and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.[7] A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit.

The respondents point to the fact that under the Railway Labor Act aggrieved employees can file their own grievances with the Adjustment Board or sue the employer for breach of contract. Granting this, it still furnishes no sanction for the Union's alleged discrimination in refusing to represent petitioners. The Railway Labor Act, in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent chosen by a majority of them. As individuals or small groups the employees cannot begin to possess the bargaining power of their representative in negotiating with the employer or in presenting their grievances to him. Nor may a minority choose another agent to bargain in their behalf. We need not pass on the Union's claim that it was not obliged to handle any grievances at all because we are clear that once it undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes.

[*Allegations Sufficient*]

The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" [8] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.[9] Following the simple guide of Rule 8 (f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondent's fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to its outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasseli Chemical Co., 303 U.S. 197.

The judgment is reversed and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

It is so ordered.

7. See Dillard v Chesapeake & Ohio R. Co., 199 F. 2d 948; Hughes Tool Co. v. Labor Board, 147 F. 2d 69, 74.

8. Rule 8 (a) (2).

9. See, e. g., Rule 12 (e) (motion for a more definite statement); Rule 12 (f) (motion to strike portions of the pleading); Rule 12 (c) (motion for judgment on the pleadings); Rule 16 (pre-trial procedure and formulation of issues); Rules 26-37 (depositions and discovery); Rule 56 (motion for summary judgment); Rule 15 (right to amend).

MISCELLANEOUS ORDERS

The United States Supreme Court:

Denied certiorari (i.e., declined to review) in the following cases:

Kasper v. Brittain (Prior decision, 245 F.2d 92, 97, 2 Race Rel. L. Rep. 792, 983, in which the Court of Appeals for the 6th Circuit had affirmed the conviction of Kasper for contempt of court in interfering with court-ordered integration of a high school in Clinton, Tennessee.) No. 315, ... U.S. ....., 78 S.Ct. 54, October 14, 1957.

Bailey v. Arkansas (Prior decision, 302 S.W.2d 796, 2 Race Rel. L. Rep. 997, in which the Supreme Court of Arkansas had found no racial discrimination in the selection of jury panels in a criminal trial.) No. 160, ... U.S. ....., 78 S.Ct. 77, October 14, 1957.

School Board of the City of Newport News v. Atkins (Prior decision, 246 F.2d 325, 2 Race Rel. L. Rep. 808, in which the Court of Appeals for the Fourth Circuit had affirmed the decision of a federal district court requiring admission of Negroes to schools in Virginia and holding the Virginia Pupil Placement Act to be unconstitutional.) No. 361, ... U.S. ....., 78 S.Ct. 83, October 21, 1957.

Granted certiorari (i.e., agreed to review) in the following case:

Eubanks v. Louisiana (Prior decision, 94 So.2d 262, 2 Race Rel. L. Rep. 825, in which the Louisiana Supreme Court had found no systematic exclusion of Negroes from the grand jury which indicted a criminal defendant.) No. 40, ... U.S. ....., 78 S. Ct. 68, October 14, 1957.

Other orders:

United States ex rel. Lee Kum Hoy v. Shaughnessy (Prior decision, 123 F.Supp. 674, 1 Race Rel. L. Rep. 225 [S.D. N.Y. 1955]; 133 F.Supp. 850, 2 Race Rel. L. Rep. 189 [S.D. N.Y. 1955]; 237 F.2d 307, 2 Race Rel. L. Rep. 193 [2d Cir. 1956]). The Supreme Court had previously granted certiorari "limited to the question of whether there was unconstitutional discrimination against petitioners by the use of blood tests in determination of their application for entry to this country" (352 U.S. 966 [1957]). A motion to substitute John L. Murff as party respondent was granted. No. 12, Orig., October, 1957, ... U.S. ....., 78 S.Ct. 10.

NAACP v. Alabama ex rel. Patterson (Prior decision, 91 So.2d 214, 2 Race Rel. L. Rep. 177 [Ala. 1957]), a motion for leave to file brief of American Jewish Congress et al. as *amici curiae* was denied. No. 91, October 28, 1957, ... U.S. ....., 78 S.Ct. 92.

COURTS

EDUCATION
Public Schools—Arkansas

Mrs. Margaret JACKSON et al. v. Colonel William A. KUHN, individually and as Commanding Officer of the 101st Airborne Infantry Regiment [sic], United States Army, et al.

United States District Court, Eastern District, Arkansas, October 15, 1957, Civ. No. 3445.

SUMMARY: On September 24, 1957, the President of the United States stationed armed forces of the United States, including elements of the Arkansas National Guard, at the Central High School of Little Rock, Arkansas, to remove an "obstruction of justice" in connection with the integration of the school ordered by the federal district court (see 2 Race Rel. L. Rep. 931-965). On October 2, 1957, a mother of children attending the school filed a petition for declaratory judgment and an injunction in federal district court. The petition named military commanders in Arkansas as respondents and sought to enjoin the "policing" of the school by the troops. The petition asserted the unconstitutionality of the use of troops and asked for the appointment of a three-judge court. The court dismissed the petition, holding that there was no substantial question as to the constitutionality of the action of the President. The petition filed and the opinion of the court are reproduced below.

PETITION FOR INJUNCTION AND DECLARATORY JUDGMENT

Petitioners represent to the court:

I.

Mrs. Margaret Jackson is a resident citizen, taxpayer and patron of the Little Rock Independent School District, embracing the attendance area of Little Rock Central High School, in Pulaski County, Arkansas, and was at all times mentioned in this petition, and she brings this petition for herself in such capacity. Said school and school district are Arkansas state-supported and owned institutions, created and provided for by the taxpayers of the State of Arkansas.

Charlene Jackson is the minor child of this petitioner, aged sixteen (16) years, and is a student in said Little Rock Central High School, Little Rock, Arkansas, and was at all times mentioned in this petition.

Sandra Jackson is the minor child of this petitioner, aged fifteen (15) years, and is a student in said Little Rock Central High School, Little Rock, Arkansas, and was at all times mentioned in this petition.

Petitioner Mrs. Margaret Jackson further brings this petition for her said minor children in such capacity of the children as stated.

Petitioner Mrs. Margaret Jackson further brings this suit for the use and benefit of all those similarly situated in said school district, such as she and her said children.

II.

The respondent, Colonel William A. Kuhn, is the Commanding Officer of the 101st Airborne Infantry Regiment of the United States Army, in command of certain armed troops of the United States government currently occupying and policing said high school and the grounds and the property thereof and the students therein, including the minor children of this petitioner.

The respondent, Major General Edwin A. Walker, is the Commanding General in charge of said occupational forces and the other federalized units consisting of the Arkansas National Guard engaging in the same mission.

III.

That respondents, under cloak of purported authority of executive order, wrongfully and

without legal or constitutional basis, did, on or about the 24th day of September, 1957, lead and command armed combat forces of the United States Army into Little Rock, Pulaski County, Arkansas, and seize state and private property, namely Little Rock Central High School and adjacent properties thereto, and intimidate, mutilate, bayonet and bludgeon private citizens thereon; all of which were in violation of petitioners' rights under the federal and Arkansas State Constitutions, and endangered the lives and safety of the petitioners herein; that any such purported executive authority was without legal foundation or precedent and a nullity.

IV.

The respondents, in policing and occupying the said properties of said school district and in policing the students in Little Rock Central High School, including the children of this petitioner, are violating the liberty and the personal and the property rights of the petitioners, and all others similarly situated, guaranteed to them under the United States Constitution. They are violating such rights for the following reasons:

(1). There are no constitutional or valid statutory provisions authorizing such actions on the part of the respondents under the United States Constitution or federal statutory law.

(2). Such actions of the respondents violate Section 4 of Article 4 of the federal constitution, and the petitioners' rights thereunder, in that respondents are committing such acts, as hereinabove set forth, without any invitation or request to do so, either from the Governor of the State of Arkansas or the General Assembly of the State of Arkansas, nor has such been requested or directed by any federal court.

(3). The said acts of the respondents are in direct violation of the fundamental concept of the United States Constitution that there exist three separate and distinct departments of the federal government, to-wit:

a. Executive.

b. Judicial.

c. Legislative.

(4). Such actions of respondents violate Amendment No. 10 to the United States Constitution, and petitioners' rights thereunder.

(5). Petitioners have been advised, and therefore allege, that the respondents are acting pursuant to executive proclamation and executive order based upon Sections 332, 333 (1) (2) and 334 [of Title 10] of the United States Code. Petitioners believe, and therefore allege, that said sections violate the provisions of the federal constitution, hereinabove set forth; and in order that the petitioners may be advised as to the correctness of their position herein, they ask for a declaratory judgment setting forth that said sections of said code are in violation of the federal constitution, particularly those provisions hereinabove set forth.

V.

Petitioners allege that, unless this court immediately restrains the respondents from continuing their unlawful acts as herein alleged, they will suffer and continue to suffer irreparable damages to their liberties, their persons and their property, as they have been suffering since the commission of the said unlawful and unconstitutional acts of the respondents, as herein alleged.

VI.

The said actions of the respondents, as herein alleged, further violate the constitutional and statutory rights of the petitioners under the Constitution of the State of Arkansas, and the laws of said state.

VII.

Petitioners allege that a three-judge federal court should be immediately convened to hear this petition and to render proper judgment herein and to determine the rights of the parties hereto.

VIII.

WHEREFORE, petitioners pray:

(1). That a three-judge court be convened immediately to hear this petition.

(2). That upon hearing this petition, the court restrain the respondents as individuals and in their official capacity from in any manner policing, occupying or interfering with the property or the students of Little Rock Central High School and the Little Rock Special School District, Little Rock, Arkansas, or suffering same to

be done, and from interfering with the operation of said school in any manner whatsoever.

(3). That the court enter its declaratory judgment declaring Sections 332, 333 (1) (2) and 334 [of Title 10] of the United States Code as being violative of the federal constitution.

(4). That petitioners have all other relief to which they may be entitled in equity.

/s/ Kenneth Coffelt
Attorney for Petitioners

DAVIES, District Judge (Sitting by Appointment)

ORDER DISMISSING PETITION FOR INJUNCTION AND FOR DECLARATORY JUDGMENT

On October 2, 1957, the petitioners herein filed with the Clerk of this Court a Petition for Injunction and Declaratory Judgment.

The Court, having the duty to determine its sufficiency where an extraordinary three-judge proceeding is sought and having carefully examined the petition, finds that although the petition challenges the constitutionality of three federal statutes, 10 U.S.C.A., Sections 332, 333 and 334, it presents no substantial federal constitutional issue cognizable by a three-judge court since the Presidential power conferred by these and antecedent federal statutes enacted by the Congress pursuant to Article I, Section 8, Clauses 15 and 16 of the Constitution of the United States, has been upheld by the Supreme Court of the United States, (Martin v. Mott, 1827, 25 U.S. 12, 12 Wheat. 19; cf. Luther v. Borden, 1849, 48 U.S. 1, 43-45, 7 How. 1, 43-45; see Sterling v. Constantin, 1932, 287 U.S. 378, 399). The Court accordingly, in the absence of other jurisdictional grounds, has both the right and the duty to dismiss the petition for lack of jurisdiction, (California Water Service Co. v. City of Redding, 1938, 304 U.S. 252, 254).

Pursuant to Rule 12(h)(2), Federal Rules of Civil Procedure, 28 U.S.C.A.,

IT IS ORDERED that the Petition for Injunction and Declaratory Judgment filed by the above-named petitioners, October 2, 1957, be and it is hereby in all things dismissed for lack of jurisdiction, upon the ground that it raises no substantial federal constitutional issue.

Dated this 15th day of October, A.D., 1957.

EDUCATION

Public Schools—Arkansas

Mrs. Margaret JACKSON et al. v. Colonel William A. KUHN, individually and as Commanding Officer of the 101st Airborne Infantry Regiment [sic], United States Army, et al.

United States Court of Appeals, Eighth Circuit, November 20, 1957, No. 15,889.

SUMMARY: Following the dismissal by the federal district court, above, of a complaint seeking to enjoin the "policing" of Central High School in Little Rock, Arkansas, by federal armed forces, the plaintiffs appealed to the Court of Appeals for the Eighth Circuit. The plaintiffs moved the Court of Appeals summarily to remand the case to the district court for trial before a three-judge court or to advance the appeal for immediate submission. The motion was denied. The court stated that the questions presented by the case were "not so unsubstantial nor the answers to them so obvious as to justify a summary disposition of" the appeal.

Before SANBORN, JOHNSON and VOGEL, Circuit Judges.

Per Curiam.

This is an appeal from an order of the District Court, (1) declining to cause a statutory three judge court to be convened under 28 U.S.C. § 2282, and (2) dismissing for lack of jurisdiction the complaint brought by the appellants against the appellees for an injunction and declaratory judgment. The appeal has been docketed, a record on appeal was filed on October 30, 1957, but no briefs have as yet been submitted, and the time for the filing of the appellants' brief has not yet expired.

The apppellants have moved this Court to summarily remand the case to the District Court for trial before a three-judge court or in the alternative, to advance the appeal for immediate submission.

[*Allegations of Complaint*]

The complaint which the appellants assert was wrongfully dismissed by the District Court on its own motion alleged in substance that the plaintiff (appellant) Margaret Jackson is a "resident citizen taxpayer and patron of the Little Rock Independent School District, embracing the attendance area of Little Rock Central High School, in Pulaski County, Arkansas"; that the school and school district are state institutions supported by state taxpayers; that the plaintiffs Charlene and Sandra Jackson are the minor children of the plaintiff Margaret Jackson and are students in the high school; that Margaret Jackson brings this action in behalf of the plaintiffs and of other persons similarly situated in the school district; that the defendants are officers of the United States Army commanding the armed troops of the United States presently policing the high school, its grounds and its students under the purported authority of an executive order and in violation of the plaintiffs' federal and state constitutional rights; that the actions of the defendants endanger the lives and safety of the plaintiffs and are violative of the personal and property rights guaranteed them by the Constitution of the United States and the rights of others similarly situated; that the actions of the defendants are without any constitutional or statutory authority, not having been invited by the Governor of Arkansas or its General Assembly or requested by any federal court; that the actions of the defendants are violative of the Tenth Amendment to the Federal Constitution; that plaintiffs are advised that the defendants are acting pursuant to Executive proclamation and order based upon Title 10, U.S.C. § § 332, 333 (1), (2) and 334; that the plaintiffs believe that these sections are unconstitutional; that unless the actions of the defendants are enjoined the plaintiffs will suffer irreparable injury; that such actions violate the Constitution and Laws of Arkansas; and that a three judge federal court should be convened forthwith to hear the complaint, to enter a proper judgment and to determine the rights of the parties.

[*Complaint Dismissed*]

In their prayer for relief in the District Court the plaintiffs asked (1) that a three judge court be convened immediately, (2) that the defendants be enjoined from policing or interfering with the property or the students of the high school, and (3) that Title 10 U.S.C. § § 332, 333(1), (2) and 334 be declared unconstitutional.

In dismissing the complaint for lack of jurisdiction the District Court in effect held that the complaint presented no substantial federal constitutional issue cognizable by a three judge court or otherwise.

Stated briefly, the plaintiffs' contention is to the effect that the District Court was so obviously wrong in dismissing their complaint that this Court should, without waiting for briefs or further argument, summarily so decide and remand the case for trial before a three judge court or in the alternative, should require an immediate submission of the apppeal.

The appellees oppose any such summary disposition of the appeal and assert that the order appealed from is a valid order. They have moved for the dismissal of the appeal as moot upon the ground that the two minor plaintiffs are no longer students at the high school and that neither they nor their mother have any legal interest in the subject matter of the action and have no standing to maintain it. This is controverted by appellants.

[*Substantial Questions*]

The questions to be briefed and argued upon this appeal which relate to jurisdiction as well as merits are not so unsubstantial nor are the answers to them so obvious as to justify a summary disposition of this appeal by remanding it for trial before a three judge court. It is to be remembered that on appeal the burden of demonstrating error is upon the appellant. It would be an exceptional case which this Court justifiably could dispose of summarily on motion and without briefs and final arguments.

The motion of the appellants for a summary disposition of this appeal is denied as is also the motion of the appellees to dismiss the appeal for mootness. If after briefs have been filed in conformity with the rules of this Court, the appellants shall be of the opinion that the case should be advanced for argument and final submission they may, upon notice to appellees, apply to this Court for a special setting.

EDUCATION
Public Schools—Arkansas

Roland SMITH et al. v. Orval FAUBUS, Chairman, The State Sovereignty Commission, et al.

United States District Court, Eastern District, Arkansas, September 19, 1957, Civ. No. 3415.

SUMMARY: Ten Negro ministers of religion in Arkansas brought a class action in federal district court against the Governor of Arkansas as Chairman of the State Sovereignty Commission and the members of the Commission. The complaint asked for the convening of a three-judge district court and a declaration that recently enacted Arkansas statutes are unconstitutional. The statutes attacked are Arkansas Acts 83, 84, 85 and 86 of 1957 (see 2 Race Rel. L. Rep. 491, 453, 495 and 456), creating the Commission and defining its duties, relieving school children of compulsory school attendance at integrated schools, requiring certain persons to register with the Commission and make periodic reports and authorizing school districts to employ legal counsel to defend suits. The petition stated that the enforcement of these acts, when read together, would deprive the plaintiffs and the class they represent of the equal protection of the laws in violation of the constitution. The defendants filed a motion to stay. The court, applying the doctrine of equitable abstention (see p. 1215, *infra*), ordered a stay pending construction of the statutes in question by courts of the state of Arkansas. A similar complaint has subsequently been filed in an Arkansas chancery court. [Following the order of the the court, the complaint is set out.]

Before VAN OOSTERHOUT, Circuit Judge, and MILLER and DAVIES, District Judges.

Order

The motion to stay filed by defendants herein comes on for hearing, the plaintiffs appearing by U. Simpson Tate, James M. Nabrit, J. R. Booker, Thad Williams, and Harold Anderson, and the defendants appearing by R. B. McCulloch, said motion being submitted to the Court upon the record, written briefs of the parties and oral arguments of counsel, and the Court being of the opinion that the motion to stay should be granted;

IT IS ORDERED AND ADJUDGED that further proceedings in this case be and the same are stayed for a reasonable period of time to permit the parties or others similarly situated to obtain an authoritative construction and interpretation of the statutes involved herein by the State Courts of Arkansas;

IT IS FURTHER ORDERED AND ADJUDGED that jurisdiction of this action be retained for the purpose of the entry of such other and further orders as may be necessary.

Dated this 19th day of September, 1957.

Complaint

I

JURISDICTION

(a) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331, this being a civil action that arises under the Constitution and laws of the United States wherein the matters in controversy exceed the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs, and Title 42, Sections 1981 and 1983, United States Code, as an action in which citizens of the State of Arkansas and of the United States contend that they, and each of them, are in grave and immediate danger of being denied and deprived of equal protection of the laws and proceedings of the State of Arkansas and of the United States for the security of persons and property as is enjoyed by white citizens of this State, and that they, and each of them, are being subjected to the deprivation of their rights, privileges and immunities secured to them by the Constitution and laws of the United States, by the Defendants named herein, and that their civil rights are being threatened by the State of Arkansas, because of their race and color, contrary to and in

violation of the Constitution and laws of the United States;

(b) The jurisdiction of this Court is further invoked under Title 28, United States Code, Section 1343(3), this being a civil action for the redress of the deprivation under color of laws of the State of Arkansas, of rights, privileges and immunities secured to your petitioners as citizens of the State of Arkansas and of the United States by the Constitution and laws of the United States.

II

INJUNCTIVE RELIEF SOUGHT

(c) The jurisdiction of this Court is also invoked under Title 28, United States Code, Section 2281, this being a civil action for injunctive relief, temporary and permanent, to restrain the enforcement, operation or execution of statutes of the State of Arkansas by restraining the action of officers of the said State in the enforcement and execution of said statutes, or of any order or orders made by the State Sovereignty Commission of the State of Arkansas while acting under and pursuant to said statutes.

III

DECLARATORY JUDGMENT SOUGHT

This is a proceeding in which a declaratory judgment is sought, pursuant to the provisions of Title 28, United States Code, Sections 2201 and 2203, this being a case of actual controversy that arises under the Constitution and laws of the United States in which the parties hereto have a vital interest, which does not involve Federal taxes, but in which plaintiffs herein petition the Court to declare the rights and legal relations of the parties herein involved, that will have the force and effect of a final judgment or decree.

IV

FACTS

1. Plaintiffs allege that they are, each of them, adult citizens of the State of Arkansas and of the United States; that they are, each of them, members of the Negro race as defined by the laws of the State of Arkansas, (Pope's Digest, Sec. 11,535; Title 41, Sec. 808, Ark. Stats. Ann., 1947), and that they are, each of them, regularly ordained, licensed and practicing ministers of the gospel of Christ; that they are of various faiths and denominations of the Christian religion; that they, and each of them, pastor churches and minister to the needs of their respective congregations and communities in the State of Arkansas, according to the tenets and dogma of their several religious creeds, and that such religious activity is their principal profession and livelihood.

2. Plaintiffs allege that they bring this action individually and in their own behalf, and on behalf of their congregations, and collectively on the part of each other, and on behalf of other persons not named herein, but who are similarly situated because of their race and color, as a class action on behalf of other Negro ministers of the gospel of Christ and their congregations in the State of Arkansas, who are similarly affected by the laws of the State of Arkansas complained of hereinafter, because of their race and color. Plaintiffs allege that they are, each of them, members of a general class of persons in the State of Arkansas who are threatened with an unlawful abridgement, deprivation and denial of their rights, privileges and immunities as citizens of the State of Arkansas and of the United States, by the State of Arkansas, and a denial of their rights guaranteed by the First and Fourth Amendments to the Constitution of the United States, because of their race and color; that the members of the class are numerous and widespread throughout the State; that they are so numerous and widespread as to make it impracticable to bring all of them before this Court; that plaintiffs, as members of the class, can and will fairly and adequately represent all of the members of the class; that the character of the right sought to be enforced and protected for all of the members of the class, who are similarly situated because of race and color, is several and that there is a common question of fact and law involved and a common relief is sought by all of the members of the class, and plaintiffs bring this action as a class action pursuant to Rule 23(a-3), Federal Rules of Civil Procedure.

3. Plaintiffs allege that they, and each of them, live and reside within the territorial limits of the jurisdiction of this Court and that they are subject to the jurisdiction thereof.

4. Plaintiffs allege that the defendant Orval Faubus, Chairman of the State Sovereignty Commission, lives and resides in Pulaski County, Arkansas, and that the principal offices of the State Sovereignty Commission are situated and located in the said County; that the defendants

Glenn Walther, Nathan Gordon and Bruce Bennett, who are ex-officio members of the State Sovereignty Commission, live and reside in Pulaski, Conway and Ouachita Counties respectively, and they perform their functions and duties as ex-officio members of the State Sovereignty Commission in Pulaski County, Arkansas, where the principal offices of the said Commission are located; that Lucius Rodgers lives and resides in Crittenden County, Arkansas; that Talbot Field, Jr., lives and resides in Hempstead County, Arkansas; that Winfred Logal lives and resides in Cleburne County, Arkansas; that C. F. (Rip) Smith lives and resides in Crittenden County, Arkansas; that Q. Byrum Hurst and Connie Fields live and reside in the State of Arkansas, and that J. L. (Bex) Shaver lives and resides in Cross County, Arkansas, and that they perform their functions and duties as members of the State Sovereignty Commission within Pulaski County, Arkansas, where the principal offices of the said Commission are located; that this is a civil action, general and not local in nature; that there are several defendants in this action; that they live and reside in different districts of the United States District Court of Arkansas, and the Little Rock Division of the United States District Court for the Eastern District of Arkansas, is proper venue for this action, (26 U. S. C. A., Sec. 1392(a)).

5. Plaintiffs allege that the Sixty-first Session of the General Assembly of the State of Arkansas has enacted a law entitled AN ACT OF CREATING THE STATE SOVEREIGNTY COMMISSION; DEFINING ITS POWERS AND DUTIES; AND FOR OTHER PURPOSES, (H. B. 322, Act No. 83, Acts of 1957), which provides, in part:

> "SECTION 10. It shall be the duty of the Commission and it shall have the power, in the name of the State of Arkansas, to:
>
> (a) Perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Arkansas, and her sister states, from encroachment thereon by the Federal Government or any branch, department, or agency thereof, and to resist the usurpation of the rights and powers reserved to this State or our sister states by the Federal Government or any branch, department or agency thereof.
>
> (b) Cooperate with one or more of the states of the union, or any agency or agencies, commission or commissions thereof, or with any person or persons, corporation or corporations, organization or organizations, and may join with them or any of them, and pool such of the funds and resources of this Commission in carrying out the objectives and purposes of this Act as may be deemed necessary and proper by the Commission.
>
> (c) Keep full and complete minutes and records of all its proceedings and actions, which said minutes and records shall be open to the inspection of any member of the Legislature at any reasonable time during the regular hours of a business day.
>
> (d) Give such advice and provide such legal assistance as the Commission considers necessary or expedient, when requested in writing to do so by resolution adopted by the governing authority of any school district, upon matters, whether involving civil or criminal litigation or otherwise, relating to the commingling of races in the public schools of the State; such advice and legal assistance to be rendered under such rules and regulations as the Commission may adopt.
>
> (e) Study and collect information concerning economic, social and legal developments constituting deliberate, palpable and dangerous invasions of or encroachment upon the rights and powers of the State reserved to the State under Amendment Number Ten of the Constitution of the United States.
>
> (f) The Commission shall submit to the General Assembly during the first week of each biennial session, beginning with the 62nd session, a comprehensive report of its activities, findings and recommendations under the provisions of this Act.
>
> (g) The Commission shall have full power and authority to do and perform any and all acts and things necessary and proper to carry out fully and effectively all the provisions of this Act."

Other provisions of the Act are attached hereto as Appendix I, and made a part hereof by reference, as though it were copied herein word for word, and part for part.

6. Plaintiffs allege that the Sixty-first Session of the General Assembly of the State of Arkansas has enacted a law entitled AN ACT RELIEV-

ING SCHOOL CHILDREN OF COMPULSORY ATTENDANCE IN RACIALLY MIXED PUBLIC SCHOOLS, (H. B. 323; Act No. 84, Acts of 1957), which Act provides, in part:

"SECTION 1. Notwithstanding any other provision of law, no child in the State of Arkansas shall be required to enroll in or attend any school wherein both white and negro children are enrolled."

Other provisions of the Act are attached hereto as Appendix II, and made a part hereof by reference, as though it were copied herein word for word and part for part.

7. Plaintiffs allege that the Sixty-first Session of the General Assembly of the State of Arkansas has enacted a law entitled AN ACT TO REQUIRE PERSONS ENGAGED IN CERTAIN ACTIVITIES TO REGISTER WITH AND MAKE PERIODICAL REPORTS TO THE STATE SOVEREIGNTY COMMISSION; AND FOR OTHER PURPOSES, (H. B. 324; Act No. 85, Acts of 1957), which provides, in part:

"SECTION 1. When used in this Act:

(c) The term "person" includes an individual, partnership, committee, association, society, corporation and any other organization or group of persons, including the officers, agents and/or employees of partnerships, associations, societies, corporations and other organizations and the subsidiaries and affiliates thereof.

"SECTION 2. (a) It shall be the duty of every person who shall in any manner solicit and receive a contribution to any organization or fund for the purposes hereinafter designated to keep a detailed and exact account of:

(1) All contributions of any amount or of any value whatsoever;

(2) The name and address of every person making any such contribution and the date thereof;

(3) All expenditures made by or on behalf of such organization or fund; and,

(4) The name and address of every person to whom any such expenditure is made, the amount and date thereof.

(b) It shall be the duty of such person to obtain and keep a receipted bill, stating the particulars for every expenditure of such fund and to preserve all receipted bills and accounts required to be kept by this section for a period of at least two years from the date of the filing of the statement containing such items.

"SECTION 3. Every individual who receives a contribution for any of the purposes hereinafter designated shall, within five (5) days after receipt thereof render to the person or organization for which such contribution was received a detailed account thereof, including the name and address of the person making such contribution and the amount and date thereof.

"SECTION 4. (a) Every person receiving any contribution or expending any money for the purposes hereinafter designated shall file with the Secretary between the first and tenth of each calendar quarter a statement containing complete as of the day next preceding the date of filing:

(1) The name and address of each person who has made a contribution not mentioned in a preceding report; except that the first report filed pursuant to this Act shall contain the name, address and amount of each contribution made since January 1, 1952;

(2) The total sum of the contributions made to and for such person during the calendar year and not stated under Paragraph (1);

(3) The total sum of all contributions made to or for such person during the calendar year;

(4) The name and address of each person to whom an expenditure has been made by or on behalf of such person and the amount, date purpose of such expenditure;

(5) The total sum of all expenditures made by or on behalf of such person during the calendar year.

(b) The statements required to be filed by sub-section (a) of this section shall be cumulative during the calendar year to which they relate, but where there has been no change in item reported in a previous statement, only the amount need be carried forward.

"SECTION 5. The provisions of this Act shall apply only to such persons who, by himself or through any agent or employee or other person in any manner whatsoever, directly or indirectly, solicits, collects or re-

ceives contributions to be used in whole or in part to aid in the accomplishment of any of the following purposes:

(a) The passage by the Congress of the United States of any proposed or pending legislation which is designed to limit or circumscribe in any manner the operation and control of school districts in Arkansas by the duly elected and qualified officers, directors, agents and employees of such school districts.

(b) The defeat by the General Assembly of Arkansas of any proposed or pending legislation which is designed to maintain and preserve inviolate the rights of the State of Arkansas to control and operate its own domestic institutions according to its own judgment.

(d) The promotion of integration of races in the public schools of the State of Arkansas contrary to the choice and desire of the patrons of such schools and the rendition of legal aid gratuitously to such negroes as may be involved, directly or indirectly, in prospective or pending litigation involving their admission into any public school in the State of Arkansas.

"SECTION 6. Any person who shall engage in the purposes set out in Section 5 of this Act shall, before doing anything in furtherance of such objects, register with the State Sovereignty Commission of Arkansas and shall give the Commission in writing and under oath his name and business address, the name and address of the person by whom he is employed and for whose interest he works for such objects, and duration of his employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses and what expenses are to be included.

"SECTION 8. Any person who violates any of the provisions of this Act shall, upon conviction, be guilty of a misdemeanor and shall be punished by a fine of not more than $5,000.00 or imprisonment for not more than twelve (12) months, or by both fine and imprisonment."

The Act, including portions not heretofore copied is attached hereto as Appendix III, and made a part hereof by reference just as though it had been copied herein word for word and section by section.

8. Plaintiffs allege that the Sixty-first Session of the General Assembly of Arkansas has enacted a law entitled AN ACT AUTHORIZING SCHOOL DISTRICTS TO EMPLOY LEGAL COUNSEL FOR CERTAIN PURPOSES AND TO PAY COMPENSATION THEREFOR (H. B. 325; Act No. 86, Acts of 1957), which provides, in part:

"SECTION 1. Notwithstanding any provision of law, the governing authority of any school district in the State of Arkansas is hereby authorized to employ counsel to defend it, or any member thereof, or any school official in any legal proceeding, to which the school board, or any member thereof, or any school official, may be a defendant."

The entire Act is attached hereto as Appendix IV, and made a part hereof by reference as though it had been copied herein word for word and section for section.

9. Plaintiffs allege that the State Sovereignty Commission is an administrative agency and instrumentality of the State of Arkansas; that it is vested with power and authority by the general laws of the State to perform public duties and functions under the general laws of the State and in the name of the State (H. B. 322; Act No. 83, Acts of 1957).

10. Plaintiffs allege that Orval Faubus is the duly designated, qualified and acting chairman of the State Sovereignty Commission; that Nathan Gordon is the duly designated, qualified and acting vice-chairman of the said Commission; that Glenn Walther and Bruce Bennett are duly designated, qualified and acting ex-officio members of said Commission, and Lucius C. Rodgers, Talbot Field, Jr., Q. Byrum Hurst, Winfred Logan, C. F. (Rip) Smith, Connie Fields, Dr. Joe Rushton and J. L. (Bex) Shaver are the duly appointed, qualified and acting members of the said Commission; that they are, each of them, administrative officers and agents of the State of Arkansas; that they hold their respective offices and perform public duties and functions pursuant to the laws of the State, and they are, each of them, sued herein in their respective official capacities as set out herein.

11. Plaintiffs say that the term "person" as

defined in Act No. 85, Section 1, sub-section (c), includes them as ministers of the gospel, the members of their congregations, and their churches, and that the plaintiffs, their congregations and their churches are members of the class of persons who are directly affected by the laws complained of herein.

12. Plaintiffs allege that the Acts of the General Assembly of Arkansas, complained of in Paragraphs 5, 6, 7 and 8, hereof, and which are set out more fully in the Appendices attached hereto, are unconstitutional and void on their faces, when read together, for the reason that: (1) they are class legislation based on the classification of race and color; (2) they fix no limits upon the power and authority of the State Sovereignty Commission, but grant sweeping and unfettered power and authority to the said Commission to invade the rights of private citizens, including the rights of plaintiffs, that go far beyond the limits of the law; (3) they are not justified by any proper or lawful governmental objective; (4) they are not designed to achieve any proper or lawful governmental objective, but to the contrary, the real objective of the laws is to circumvent the supreme law of the land by protecting and perpetuating racial segregation in the public schools of the State of Arkansas, and that the laws are but a cunning stratagem to deprive the plaintiffs and all other members of the Negro race in the State of Arkansas, who are similarly situated because of their race and color, of their birthright: the equal protection of laws, as provided by the Constitution and laws of the United States, and that the State Sovereignty Commission was created to effectuate a purely racial discrimination, to prohibit plaintiffs and other Negro citizens of the State of Arkansas from gaining and protecting their civil rights and privileges and immunities secured to them as citizens of the United States, and to deprive plaintiffs and other Negro citizens of the State of Arkansas, similarly situated because of their race and color, of their freedom of speech and assembly, and their fundamental rights of petition secured to them by the First and Fourteenth Amendments to the Constitution of the United States.

13. Plaintiffs allege that they have in the past solicited, collected and received contributions which were used in whole or in part to aid in the promotion of the integration of the races in the public schools of the State of Arkansas; that they desire to solicit, collect and receive contributions for similar purposes in the future; that the same is a lawful purpose; that it is a proper function of the Church and of ministers of the gospel of Christ, but that under the laws of the State of Arkansas, complained of herein, plaintiffs and other Negro citizens of Arkansas who are similarly situated because of their race and color, are unlawfully prohibited by the State of Arkansas from engaging in this lawful purpose, because of their race and color, and that they, and each of them, will be prohibited from engaging in this lawful purpose in the future by the State of Arkansas, because of their race and color, unless the laws complained of herein are declared unconstitutional and void by this Honorable Court and the defendants named herein are enjoined from enforcing the said laws against the plaintiffs and other Negro citizens of Arkansas similarly situated, because of their race and color.

14. Plaintiffs allege that they have in the past solicited, collected and received contributions which were used in whole or in part to defeat the enactment of proposed and pending legislation in the General Assembly of the State of Arkansas which was designed to maintain, preserve and perpetuate the practice of racial segregation in the public schools of the State of Arkansas; that they have in the past solicited, collected and received contributions to be used in whole or in part to sponsor and support the passage by the Congress of the United States of any proposed or pending legislation which is designed to limit and circumscribe the operation of school districts in Arkansas to the extent that such school districts are and shall be operated in manner inconsistent with the requirements of the Constitution and laws of the United States; that they desire and intend to solicit, collect and receive contributions in the future to be used in whole or in part for the same and similar purposes; that this is a lawful purpose; that this is a proper function of the Christian Church and of ministers of the gospel of Christ, but that under the laws of the State of Arkansas, complained of herein, plaintiffs and other Negro citizens of the State of Arkansas who are similarly situated because of their race and color, are unlawfully prohibited by the State of Arkansas from engaging in these lawful purposes because of their race and color, and that they, and each

of them, will be prohibited from engaging in this lawful purpose in the future by the State of Arkansas because of their race and color, unless the laws of Arkansas complained of herein, are declared unconstitutional and void by this Honorable Court, and the defendants named herein be enjoined from enforcing the said laws against plaintiffs and the members of the class of persons whom they represent who are similarly situated because of their race and color, thereby denying to plaintiffs rights secured to them by the First Amendment to the Constitution of the United States.

15. Plaintiffs allege that the laws of the State of Arkansas have not required them to keep, in the past, and that they have not kept, in the past, any record or records of amounts solicited, collected or received to be used in whole or in part for the purposes prohibited by the laws of Arkansas complained of herein; that they have not kept any record or records of amounts expended for such purposes; that they have not kept any record or records of the names and addresses of the person or persons who contributed to such collections; that no demand or demands have been made upon plaintiffs by the State of Arkansas to keep any such records prior to the enactment of the laws complained of herein; that as a result of this, plaintiffs will be unable to file a report with the Secretary of the State Sovereignty Commission that will contain the names and addresses of contributors and the amount or amounts contributed by each contributor, nor will plaintiffs be able to provide the names and addresses of persons on whose behalf such funds have been expended from January 1, 1952 to the present, as is required by Section 4, of Act No. 85, which is one of the Acts complained of herein; but that plaintiffs and the members of the class of persons whom they represent are required by the laws to make such report and upon failure to make such report, plaintiffs and all other Negro citizens of the State of Arkansas who are similarly situated because of their race and color, become subject to a fine of $5,000.00, or one year of imprisonment, or both, unless the said laws are declared unconstitutional and void by this Honorable Court.

16. Plaintiffs allege that in the practice of their professions as ministers of the gospel of Christ, and as religious leaders and teachers of the divine laws of Jesus Christ in Churches and communities that are composed of persons who are members of the Negro race, it is their Christian duty to solicit, collect and receive contributions to be used in whole or in part for purposes that aid and enhance the moral, social, educational and Christian welfare of the members of their congregations and of the communities which they serve; that in this connection it is the sacred duty of plaintiffs and all other Negro ministers of the gospel of Christ in the State of Arkansas, who are similarly situated because of race and color, to solicit, collect and receive contributions to be used in whole or in part to protect the members of their congregations in their right to petition their Government, Federal and State, for redress of their grievances; that it is their duty to solicit, collect and receive contributions to be used in whole or in part to secure for themselves, for the members of their congregations and for all Negro citizens of the State of Arkansas, who are similarly situated because of race and color, the right and the privilege of sending their children to the public schools of the State and having them receive public education on a non-segregated and non-discriminatory basis without any distinctions being made as to them because of their race and color; that the laws of the State of Arkansas complained of herein, and their enforcement by the defendants named herein will greatly restrain and restrict plaintiffs and other Negro ministers of the gospel of Christ in the State of Arkansas who are similarly situated because of their race and color in the practice of their professions and restrict them in the exercise of their liberty and freedom without due process of law, and cause plaintiffs irreparable harm and injury, unless the said laws of the State of Arkansas are declared unconstitutional and void, and the defendants named herein are enjoined from enforcing the said laws against plaintiffs and other Negro citizens of the State of Arkansas who are similarly situated because of their race and color.

17. Plaintiffs allege that the mission of charity is a fundamental function of the Church; that the right of plaintiffs and other Negro citizens of the State of Arkansas who are similarly situated because of race and color, to solicit, collect and receive contributions for lawful charitable purposes is a fundamental right; that the rendition of legal aid gratuitously to such Negroes as may be involved in prospective or pending litigation involving their admission or the admission of their children to any public school in the State

of Arkansas is a lawful charitable purpose; that the laws of the State of Arkansas complained of herein and their enforcement against plaintiffs and other Negro citizens of the State of Arkansas who are similarly situated because of their race and color, by the defendants named herein will greatly harm and hinder the Church in its legitimate function and amount to an undue interference with plaintiffs and other Negro citizens of the State of Arkansas who are similarly situated because of their race and color, in their freedom of religion and Christian worship contrary to and in violation of the Constitution and laws of the United States, unless the said laws of the State of Arkansas are declared unconstitutional and void, and the defendants named herein are enjoined by this Honorable Court from the enforcement of said laws.

18. Plaintiffs allege that the purported emergency declared by the General Assembly of the State of Arkansas upon which the validity of the laws of Arkansas complained of herein must stand is not supported in fact; that there is in fact no emergency existing with respect to the lawful operation of the public schools of the State of Arkansas; that there is no clear and present danger of harm or injury to the health, safety or general welfare of the people of the State of Arkansas to justify such stringent use of the police power of the State, and that the said laws are unconstitutional and void for the reason that the police power of the State can not be invoked to sustain the maintenance and perpetuation of racial segregation in the public schools of the State of Arkansas.

19. Plaintiffs allege that the enforcement of the laws set out in Paragraphs 5, 6, 7 and 8 hereof, and set out more fully in the Appendices hereof, against the plaintiffs and all other Negro citizens of the State of Arkansas who are similarly situated because of race and color, will deprive the plaintiffs and the members of the class of persons whom they represent and who are similarly situated because of race and color, of their civil rights as citizens of the United States and deny them due process of law and the equal protection of laws secured to them by the Constitution and laws of the United States and do them great and irreparable harm and injury in their status as citizens of the United States and that they have no plain, efficient or adequate remedy at law; that any other remedy to which plaintiffs and the members of the class of persons whom they represent who are similarly situated because of their race and color, would amount to great vexation and delay and substantial denial of relief.

WHEREFORE, the premises considered, plaintiffs respectfully pray that upon the filing of this complaint, as may appear proper and convenient to the Court:

1. That a statutory three-judge district court be convened pursuant to Title 28, United States Code, Sections 2281 and 2284;

2. That this cause be advanced on the docket of the court and a speedy trial be ordered, and upon a hearing thereof:

(a) That this Honorable Court enter a preliminary injunction to enjoin the defendants, and each of them, their agents, servants and their successors in office, from enforcing Acts No. 83, 84, 85 and 86, of any of them complained of herein, against plaintiffs or any other Negro citizen of the State of Arkansas who is similarly situated because of race or color, or from doing any act or thing to deprive plaintiffs or any member of the class of persons whom they represent, of their civil rights, or of any right, privilege or immunity secured to them by the Constitution and laws of the United States because of their race or color;

3. That upon final hearing of this cause on its merits, this Court enter a declaratory judgment and final decree that Acts No. 83, 84, 85 and 86, complained of herein, are unconstitutional and void for the reason that their enforcement against plaintiffs or any other Negro citizen in the State of Arkansas, who is similarly situated because of race and color, will deny them their civil rights as citizens of the United States, due process of law and the equal protection of laws secured to them by the Constitution and laws of the United States;

4. That this Court enter a permanent injunction forever restraining defendants, and each of them, their agents, servants and their successors in office from enforcing Acts No. 83, 84, 85 and 86 complained of herein, against plaintiffs or any other Negro citizen of the State of Arkansas who is

similarly situated because of race or color, or from doing any act or thing pursuant to said laws to interfere with plaintiffs or any other Negro citizen of the State of Arkansas, who is similarly situated because of race and color, to interfere with them in the free exercise of their religious beliefs, or to deny or deprive them of their civil rights as citizens of the United States, or to deprive them of rights, privileges or immunities secured to them by the Constitution and laws of the United States, because of their race and color;

5. Plaintiffs pray for such other and further relief in law or equity as they may be entitled to in the premises, and for their costs incurred herein.

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ATTORNEYS FOR PLAINTIFFS

EDUCATION
Public Schools—Kentucky

Louella WILBURN, et al. v. W. L. HOLLAND, Superintendent of the Fulton City Schools, et al.

United States District Court, Western District, Kentucky, September 10 and October 4, 1957, 155 F.Supp. 419.

SUMMARY: A class action was brought by Negro school children in federal district court in Kentucky against officials of the Fulton, Kentucky, city schools. The action sought an injunction to abolish racial segregation in the city high school. On February 5, 1957, the court entered an order requiring the defendant school officials to file with the court, by March 25, 1957, a plan for integration of the school. No plan having been filed, the plaintiffs filed a motion for a default judgment on June 14, 1957. On September 10, 1957, the court rendered a default judgment against the school officials and issued an injunction requiring the admission of the class represented by the plaintiffs to the high school at the "next regular term" (September, 1957) of the school. The defendants then requested a modification of the order, stating that problems of school plant and administration would make the present admission of Negroes to the high school not feasible. The court granted the requested modification on October 4, 1957, ordering the integration of the high school to be begun by the beginning of the 1958-59 school term.

SHELBOURNE, District Judge.

[ORDER OF SEPTEMBER 10, 1957]

This cause coming on to be heard upon plaintiffs' motion to strike defendants' motion to dismiss the action and defendants' answer and to enter a judgment by default against defendants for the relief demanded in the complaint, as amended, upon the grounds of defendants' failure to serve answers to interrogatories submitted under Rule 33 after proper service of such interrogatories, and the Court being advised, it is ORDERED that plaintiffs' said motion be and it is hereby sustained and that said motion to dismiss and said answer be and they are hereby each stricken, and default is now entered against the defendants and each of them.

It is, therefore, ORDERED, DECREED and ADJUDGED by the Court:

1. That the defendants, and each of them,

be and they are hereby permanently and perpetually enjoined and restrained from maintaining or enforcing against plaintiffs or any of them, or against any member or members of the class composed of persons situated similarly to plaintiffs, the unconstitutional practice, custom and usage complained of in the complaint, and from excluding plaintiffs or any of them or any member or members of said class from admission to the high school maintained by the defendants for the Fulton Independent School District upon the ground of their membership in the Negro race or upon any other ground not equally applicable to white persons.

2. That the defendants, and each of them, be and they are hereby mandatorily enjoined to admit such of the plaintiffs or of the other members of said class of persons who may apply therefor to the said high school as students at the next regular term or semester of said school, and at each term or semester thereafter at which any of said persons may apply for such admission, upon the same terms and conditions as are applied by the defendants to applicants for such admission who are members of the white race, and no others.

3. That plaintiffs recover of defendants their costs expended in this action, for which costs execution is awarded.

This 10th day of September, 1957.

[*Subsequent Opinion and Order*]

MEMORANDUM

This case is presently before the Court on defendants' motion to modify the default judgment entered herein on September 10, 1957. The plaintiffs filed response to the motion and, on October 3, 1957, the Court heard testimony of the parties and their witnesses.

The original petition in this action was filed November 16, 1956, by sixteen (16) named plaintiffs against the Fulton City Board of Education, W. L. Holland, Superintendent of the Fulton City Schools, and the chairman and individual members of the Fulton City Board of Education. Jurisdiction was invoked under Section 1343 of Title 28 and Section 1983 of Title 42 of the United States Code. The named plaintiffs are all Negroes allegedly qualified for admission as students in the high school conducted by the defendants in the City of Fulton, Kentucky. The plaintiffs sought interlocutory and permanent injunctions requiring the defendants to immediately admit the plaintiffs and all other Negroes in the class represented by the named plaintiffs, restraining and enjoining the defendants from denying admission to the high school at Fulton, Kentucky, to all of the class of which plaintiffs are members. It was alleged that on August 4, 1955, plaintiffs had petitioned the Board of Education to cease its alleged discriminatory practice of excluding the Negro children within the school district because of their race and that, on September 5, 1955, certain of the plaintiffs presented themselves for admission as students in Fulton High School and were refused admission solely because of their race and color.

[*Answer Filed*]

The defendants filed answer alleging, among other things, that the plaintiffs were being transported to high schools located outside of Fulton, and that they had been assigned to other schools and were not legally entitled to admission in the Fulton High School during the school year 1955-1956. It was further alleged that a committee had been appointed to recommend a plan of integration, but at the time the answer was filed no plan had been presented by such committee. A separate motion to dismiss was filed. It raised the technical question of the proper name of the school board and the plaintiffs, with leave of the Court, filed their amendment to correct that irregularity.

By an order entered on February 5, 1957, the defendants were directed to amend their pleadings herein by filing with the Court, on or before March 25, 1957, "a comprehensive plan for the abolition and elimination of the alleged unconstitutional practices complained of in plaintiffs' complaint." This order was entered after a pre-trial conference with counsel for both parties. The defendants ignored the order of the Court and failed to file any plan for integration of Fulton High School as directed, and did not advise the Court, by pleading or informally, of any decision or purpose to ignore or disregard the order.

Under date of May 24, 1957, the plaintiffs filed interrogatories under Rule 33 of the Federal Rules of Civil Procedure, and, on May 28, 1957, filed fifteen (15) separately numbered requests for admission. The defendants ignored both the interrogatories and the requests for admission.

[*Motion for Default Judgment*]

Subsequently, on June 14, 1957, the plaintiffs filed a motion for default judgment, pursuant to Rule 37(d) of the Federal Rules of Civil Procedure. This motion was supported by the affidavit of one of plaintiffs' counsel, setting forth the facts with respect to the defendants' disregard of the Court's order requiring defendants to submit a plan of integration and defendants' failure and refusal to file response to the requests for admission and answers to the interrogatories. Notwithstanding the fact this motion was filed on June 14, 1957, a default judgment was not signed by the Court until September 10, 1957, the Court being of the opinion that perhaps the defendants had formulated a plan of integration at Fulton High School for the term of school beginning on September 2, 1957. Meanwhile, most of the plaintiffs had been entered as students in other high schools; some in the high school at Martin, Tennessee, and others in a high school at Hickman, Kentucky, which schools are shown to have begun their 1957-1958 term in the month of July.

The judgment submitted by the plaintiffs and signed and entered by the Court mandatorily enjoined the defendants to admit the plaintiffs, and such other members of the class represented by them, who applied for admission to the Fulton High School "at the next regular term or semester of said school" upon the same terms and conditions as were applied by defendants to applicants for admission who are of the white race.

[*Modification Urged*]

Shortly following the entry of the judgment, defendants' counsel requested a conference with the Court and plaintiffs' attorney to have determined whether the intent of the judgment was to require admission of the plaintiffs, and members of the class represented by the plaintiffs, to Fulton High School in the term of school which had begun on September 2, 1957. The defendants were informed by the Court at that conference that it was the intent and purpose of the Court in said judgment to require the admission of such of the plaintiffs, and the class represented by them, as met the requirements and possessed the qualifications generally necessary for admission as students in the Fulton High School to the term of said school which began September 2, 1957. Whereupon, defendants filed the present motion seeking a modification of the judgment so as to make its mandatory injunctive provisions effective for the school year 1958-1959, saying that all things necessary to be done to orderly integrate Negro students resident within the school district would be done.

The allegations of the motion and the defendants' testimony by Superintendent W. L. Holland were to the effect that all of the plaintiffs and all members of the class represented by the plaintiffs are presently, and have been since some date in July, 1957, enrolled in high school either at Hickman, Kentucky, or at Martin, Tennessee, and are all supplied with textbooks and equipment which could not be utilized by them as students in the Fulton High School. It was shown that Fulton High School for many years past has not had semesters and that, with the exception of one course of study, the students use the same textbooks for the entire school year. It was further shown that the student body of Fulton High School increased at the beginning of the present school year, 1957-1958, and that the classes are about up to the capacity of the teaching staff and physical equipment. It was testified by Superintendent Holland that a transfer by the plaintiffs, and the members of the class represented by them, from the schools they are now attending to the Fulton High School would almost inevitably result in the students having to be classified in lower grades than those in which they are now classified, and that there would be a delay of from four to six weeks in supplying them with textbooks should they now be enrolled.

[*Handicaps to Integration*]

While plaintiffs' counsel did not specifically concede that the handicaps to the plaintiffs as students in Fulton High School during the present school year would be as great as were suggested by Superintendent Holland, it was apparent to the Court that plaintiffs' counsel recognized the probability that some handicaps and hardships might result from an immediate transfer of the plaintiffs to the Fulton High School. Plaintiffs' counsel stated that they desired to make no concession as to the plaintiffs' right to enter Fulton High School at this time; however, if it was the opinion of the Court that the welfare of the children and their education would be impeded or handicapped and if the authorities in charge of Fulton High School would in good faith inaugurate an orderly plan

and program for the full integration of the school prior to the school year beginning 1958-1959, plaintiffs' counsel suggested that it might be in the best interest of all concerned, and within the meaning of the Supreme Court's idea of "deliberate speed" in the integration of schools, to modify the judgment and defer the injunctive mandate of the Court until after the end of the present school year.

It is apparent to this Court that had the defendant authorities in charge of the Fulton High School manifested the same degree of interest and apparent cooperation prior to the entry of the original judgment in this action as has been exemplified by them since that event we would have no problem at this time and by this time an orderly integration would have been consummated. The Court feels an element of partial responsibility in the delay in the entry of the default judgment.

But, regardless of where the fault may be laid, it is apparent at this time to the Court that the former judgment should be modified. As of this date a separate order is entered modifying the original judgment so as to require under mandatory injunction, the defendants to inaugurate an orderly plan and procedure to integrate the Fulton High School, eliminating any discrimination of the plaintiffs, and the members of the class represented by them, who may apply for admission as students at the beinning of the school term for the school year 1958-1959.

ORDER

For the reasons set forth in a memorandum of even date herewith, IT IS ORDERED that the Judgment of this Court entered in this action under date of September 10, 1957, be and same is hereby modified in the following respects; that the defendants, and each of them, be and they are hereby mandatorily enjoined to admit such of the plaintiffs, or members of the class of persons represented by the named plaintiffs, who may apply for admission as students at the Fulton High School at the next regular term of said school for the school year 1958-1959, and for each successive year thereafter, upon the same terms and conditions applicable or made applicable by the defendants to applicants for admission who are members of the white race.

Said defendants are hereby further mandatorily enjoined to do all things necessary to be done in the planning of a curriculum for the school year 1958-1959 so as to include the plaintiffs and members of the class represented by the plaintiffs for the school year 1958-1959 and all terms of said school thereafter.

To the extent set forth the original judgment is hereby modified, and except as herein specifically modified the same shall remain in full force and effect.

October 4, 1957

EDUCATION
Public Schools—Texas

Delores ROSS, a minor, by her mother and next friend, Mary Alice Benjamin, et al. v. Mrs. Olon ROGERS, as President of the Board of Trustees of the Houston Independent School District, Houston, Harris County, Texas, et al.

United States District Court, Southern District, Texas, October 15, 1957, Civ. No. 10,444.

SUMMARY: Negro school children in Houston, Texas, brought an action in federal district court against city school officials. The action sought a declaratory judgment as to the constitutionality of Texas statutes and constitutional provisions which require or permit racial segregation in public schools and injunctive relief against school officials to require them to admit the plaintiffs to public schools without regard to race or color. The court found the Texas statutes and constitutional provisions to be invalid insofar as they require racial segregation and ordered the admission of the Negro plaintiffs to schools without regard to race "with all deliberate speed" but without fixing a definite time for desegregation.

CONNALLY, District Judge.

This action is another of the series[1] filed throughout the South since Brown v. Board of Education (347 U.S. 483, 1954; 349 U.S. 294, 1955) was decided, wherein the effort is made to speed the process of desegregation of the public schools. This Court is vested with jurisdiction under §§ 1331 and 1343(3) of Title 28 U.S.C.A.

[*Three-Judge Court*]

Initially, request was made that a three-judge district court be convened pursuant to § 2284 of Title 28 U.S.C.A. by reason of the fact that injunctive relief was sought restraining the action of state officials, upon the ground that Sec. 7 of Art. VII of the Constitution of Texas and Art. 2900, 2922-13, and 2922-15 of Vernon's Civil Statutes of this State were unconstitutional and void insofar as such provisions required the maintenance of the public schools of the State upon a racially segregated basis. In view of the language contained in the Brown decision, and of the opinion of the Supreme Court of Texas in McKinney v. Blankenship (154 Tex. 632; 282 S.W. 2d 691), it was not considered that the unconstitutionality of those provisions remained in doubt, and the request for a three-judge court was denied.[2] The matter has been heard by a single judge of this Court.

This action follows the familiar pattern. The schools maintained by the Houston District, as has been the custom throughout the South since the era of Reconstruction, have been operated upon a racially segregated basis. Certain schools are provided for the exclusive attendance of white students. These are staffed and administered by white teachers and principals. Other schools are maintained solely for colored scholastics and are staffed by colored educators. No contention is made that the schools for colored children maintained by the defendant Board are inadequately staffed, equipped, or in any way inferior to the schools for the whites.

In September, 1956, on the date designated for registration for the regular term beginning shortly thereafter, the two school-aged children of the Negro race who were chosen by their elders to make the local test, applied for admittance to the all white schools nearest their residence, rather than to the schools for colored which previously they had attended. Their admittance was denied because of their race, though otherwise they were fully qualified to attend. They were referred instead to their former schools, at a somewhat greater distance from their place of residence. This action is the result.

[*Relief Sought*]

Alleging a question of law common to themselves and other minor Negro scholastics, under Federal Rule of Civil Procedure 23(a)(3), the plaintiffs file and press the action as a spurious class suit, not alone for their own benefit, but on behalf of others similarly situated. The relief sought is (a) a declaratory judgment to the effect that operation of its schools by the Houston District upon its present racially segregated basis is unlawful; (b) a declaration that Sec. 7, Art. VII of the Constitution of this State and portions of Art. 2900, 2922-13 and 2922-15 of Vernon's Civil Statutes of this State are unconstitutional, insofar as they require racially segregated schools; and (c) an injunction to restrain the school board and its officers and employees from enforcing any rule, regulation or order based upon those constitutional and statutory provisions which would require the operation of the schools of this District on a racially segregated basis.

[*Status of Defendants*]

The Defendants are Houston Independent School District, the individuals presently composing the Board of Trustees thereof,[3] and the Superintendent of the District.[4] The District is a body corporate and politic, created pursuant to Texas statute (Art. 2768, et seq.), and charged with ownership and operation of the

1. Some of which are: *Whitemore v. Stillwell*, 227 F.2d 187 (5C), Texarkana Junior College case; *Jackson v. Rawdon*, 135 F.Supp. 936, 235 F.2d 93 (5C); Mansfield, Texas, case; *Brown v. Rippy*, 233 F.2d 796, Dallas, Texas, case; *Avery v. Wichita Falls Independent School District*, 241 F.2d 230, Wichita Falls, Texas, case; *McSwain v. County Board of Education*, 138 F.Supp. 570, Clinton, Tennessee, High School case; *Adams v. Lucy*, 134 F.Supp. 235, 228 F.2d 619 (5C) University of Alabama case; *Bush v. Orleans Parish School Board*, 138 F.Supp. 337, 242 F.2d 156 (5C), New Orleans, Louisiana case.
2. *Bush v. Orleans Parish School Board*, 138 F.Supp. 336, and cases there cited; *Davis v. School Board*, 142 F.Supp. 616, and cases there cited.
3. Mrs. Frank Dyer, Chairman; Dr. Henry A. Peterson; Dr. W. W. Kemmerer; James M. Delmar; Mrs. Earl Maughmer, Jr.; Stone Wells; Mrs. A. S. Vandervoort, Jr.
4. Dr. William E. Moreland.

properties of the public free school system of the State within the geographical limits of the District. The trustees are elective officers, holding for staggered terms of four years, who serve without compensation. The Superintendent is the chief administrative officer of the system.

The facts in the case are not in dispute, and those of controlling importance are the subject of a stipulation to which I refer for all purposes. Similarly, the controlling principles of law are now clearly settled, and the position embraced by the School Board before this Court, both in oral argument and in the briefs submitted, actually leaves little for decision.

[*Effect of School Cases*]

Perhaps this is the appropriate time and place at which to lay at rest certain popular misconceptions as to the issues presented by this litigation; and to set out what is—and what is not—before the Court for determination.

The Brown decision of 1954 abandoned, in the field of public education, the "separate but equal" doctrine of Plessy v. Ferguson (163 U.S. 537) which had been accepted without question for half a century. The essence of Brown was simply that no longer might the race or color of the students be utilized by local authorities as a basis of classification or segregation in the administration of the public schools; and that when all other considerations were equal, the white and the colored child were entitled not to equal treatment but to the same. The decision likewise held that the state statutes requiring racial segregation in the public schools, on which the school authorities in those cases then before the court relied, were in contravention of the "equal protection" clause of the Fourteenth Amendment, and to that extent were of no force and effect.

[*Invalidity Admitted*]

Despite the Brown decision, in some instances in similar litigation elsewhere the local authorities have continued to assert the validity of state statutes under which racial segregation in the schools was practiced.[5] It is not so here. The Houston Independent School District admits the force and effect of Brown, and of McKinney v. Blankenship. It does not contend that its present policy of segregation is lawful or is justified by Texas statute. It concedes that in excluding the two minor plaintiffs here involved from the schools to which they sought admission, for the sole and only reason that they were members of the Negro race, they denied them the equal protection of the law, as held by Brown. The defense—and only defense—is the contention that a court of equity temporarily should withhold injunctive relief; the reason being that the defendant Board is making rapid strides toward an overall program of desegregation. It is argued that the transition is attendant with many administrative problems of great complexity; and it is suggested that the public good flowing from an orderly and planned program of desegregation to be adopted and enforced by the Board, without Court intervention, warrants a temporary delay in the enforcement of the constitutional rights of the two individuals primarily involved here.[6]

[*Delay Appropriate*]

This argument is cogent and weighty. It cannot be denied that the first intermingling of the races in the schools of a community is calculated to arouse tension and emotional unrest. The customs and traditions in which the peoples of this land have been steeped for a century are not forgotten in a day. The layman does not readily understand that what on yesterday had been accepted law for a generation is no longer law today. The daily press and periodicals show that in many Texas cities [7] where the local school authorities have placed in operation their own carefully devised plans for desegregation, the transition has been without incident. This is in sharp contrast to the situations presented in other cities [8] where the enforcement of court action in similar cases has led to resentment, rioting and disorder.

On behalf of the plaintiffs it is argued that the defendant Board is not sincere in this position; and that its stated acceptance of Brown, and its efforts to comply, are but a tongue-in-cheek attitude. It is suggested that by dilatory tactics the Board seeks only to maintain the status quo until the last possible moment, and never in fact

5. For example, *Orleans Parish School Board v. Bush*, 242 F.2d 156; *Adkins v. School Board of Newport News*, 148 F.Supp. 430.

6. See *Davis v. County School Board of Prince Edward Co.*, 149 F.Supp. 431

7. San Antonio, Corpus Christi, Amarillo, Austin, Lubbock, El Paso and San Angelo, among others.

8. For example, in Clinton, Tennessee (*McSwain v. County Board of Education, supra*); Mansfield, Texas (*Jackson v. Rawdon, supra*); and more recently in Little Rock, Arkansas.

to admit a Negro student except under court compulsion. These being elective offices, it is suggested that the members of the Board then intend to adopt the attitude of having washed their collective hands of the controversy; and after all possible delay ultimately to pass on to the courts a task which the Board finds odious and unpopular.

While there are circumstances here which lend considerable support to this position, I am not as yet prepared to find that these public officials are so blind to their duty or devoid of responsibility as to abandon their obligation properly to administer the schools in a time of crisis. If it be true that the Board desires to temper the impact of the Brown decision, I do not wish to deny them the opportunity.

[*Administrative Problems*]

Brown specifically holds that public education is primarily a state function, to be administered at the local level. It divests the local boards of authority in only a single particular, namely, color and race no longer may be used as a basis for classification of students in the administrative process. There remains a very wide area for the exercise by the local boards of their administrative function.[9] In the final analysis the rules adopted by the Houston Board dealing with school zoning, the extent to which voluntary transfers from one school to another are allowed, and related matters, will determine the extent to which the races are intermingled in the classroom here. The experience of those schools which have begun the desegregation process shows that the vast majority of children of both races prefer the association of their own kind, where freedom of choice is allowed them. They seek not so much the enforcement, as the recognition, of their right to attend non-segregated schools. These problems may be solved or alleviated by intelligent and skillful administration. But they are beyond the orbit of Court action.

This being a class suit under Federal Rule of Civil Procedure 23(a)(3), the judgment to be entered here will bind only those who are parties to the action (Martinez v. Maverick County Water Dist., 219 F.2d 666 (5C); Kainz v. Anheuser-Busch, Inc., 194 F.2d 737 (7C); Moore's Federal Practice Vol. 3, p. 3442, et seq.). The class action presents only those questions of law which the two named plaintiffs share with other colored children of school age. All of such long since have been settled by Brown and related cases, and present no controverted issue here.

[*Duty of Court*]

From all of the foregoing it should be apparent that the Court in this proceeding is not called upon to present some "plan" of its own to bring about desegregation, or to order desegregation to begin in all of the Houston schools on a particular date. The only issue is whether Delores Ross, a nine year old child who seeks, and is entitled, to enter Sidney Sherman Elementary School,[10] should further be denied such admission because her enrollment there would present serious administrative problems to the School Board. To state the question in this fashion is to suggest the answer. Any delay will be warranted only if the Board immediately comes to grips with its problem. A court of equity will not countenance inordinate delay or evasion where the enjoyment of a constitutional right is involved, though its recognition and enforcement be difficult and unpopular.

Counsel for all parties here have shown a highly commendable attitude of moderation and restraint somewhat unusual in cases of this character. The Court desires here to take note of that fact.

[*Form of Order*]

On the oral submission, counsel for the plaintiffs sought a mandatory injunction which would compel the admission of these plaintiffs to the schools of their choice on a day certain, unless sooner admitted voluntarily by the defendant Board. Since that time this prayer for relief has been amended, and plaintiffs now ask that an injunction issue in the form approved by the Court of Appeals for this Circuit in the New Orleans and Dallas cases,[11] directing that the defendants proceed with all deliberate speed to-

9. In this connection see opinion of the District Court for the Eastern District of South Carolina, *Briggs v. Elliott*, 132 F.Supp. 776; *Avery v. Wichita Falls Independent School District*, 241 F.2d 230 (5C); and *Adkins v. School Board of Newport News*, 148 F.Supp. 430.

10. And Beneva Williams, who seeks, and is entitled to enter McReynolds Junior High School.

11. New Orleans, *Orleans Parish School Board v. Bush*, 242 F.2d 156 (5C); Dallas, *Borders v. Rippy*, Fifth Circuit opinion dated July 23, 1957, as yet not reported officially.

ward the maintenance and operation of the schools of this district upon a racially non-discriminatory basis. Clearly to that much plaintiffs are entitled.

Decree will enter declaring the policy of racial segregation now enforced by the defendants in the schools of the Houston Independent School District to be unlawful; declaring Sec. 7 of Art. VII of the Constitution of this State and Art. 2900, 2922-13 and 2922-15 of Vernon's Civil Statutes of this State to be violative of the Fourteenth Amendment of the Constitution of the United States insofar as those articles require the maintenance of racially segregated schools, and to that extent void. An injunction will issue as indicated, and in the form heretofore discussed with counsel. The Court will retain the action on its docket to assure compliance with its mandate.

This memorandum together with the stipulation on file herein shall constitute Findings of Fact and Conclusions of Law.

Clerk will notify counsel.

Done at Houston, Texas, this 15th day of October, 1957.

ORDER

The above entitled and numbered cause having come on to be heard by the court on application of plaintiffs for declaratory judgment and for permanent injunction, and the minor plaintiffs having appeared herein by and through their next friend and attorneys of record, and the defendants having appeared by and through their attorneys of record, and all parties having announced ready for trial, the court proceeded to hear the pleadings, evidence and argument of counsel, and having heretofore filed its findings of fact and conclusions of law herein, it is therefore:

ORDERED, ADJUDGED AND DECREED that Art. 7, Sec. VII of the Constitution of the state of Texas, Art. 2900, 2922-15 of the Revised Civil Statutes of Texas are unconstitutional and void insofar as such constitutional and statutory provisions require the segregation of the races in the public schools operated by the defendants herein;

It is further ordered, adjudged and decreed that the policy and practice heretofore adopted by the defendants pursuant to the above mentioned constitutional and statutory provisions under which the defendants in the maintenance and operation of the public schools within the territorial limits of the Houston Independent School District have required and enforced racial segregation be, and same are hereby held to be, unlawful and violative of the constitutional rights of the minor plaintiffs herein.

It is further ordered, adjudged and decreed that the defendants, Houston Independent School District, a body corporate, Dr. W. W. Kemmerer, James M. Delmar, Mrs. Frank Dyer, Dr. Henry A. Peterson, Mrs. A. S. Vandervoort, Mrs. Earl Maughmer Jr. and Stone Wells, as officers and members of the board of trustees of the Houston Independent School District and their successors in office, their agents, servants and employes, and those who may act in concert with them who shall receive notice of this order, be and are hereby restrained and enjoined from requiring segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis, with all deliberate speed, as required by the decision of the Supreme Court of the United States in *Brown v. Board of Education of Topeka,* 349 U.S. 294.

It is further ordered, adjudged and decreed that a bond be filed by plaintiffs herein in the sum of One Thousand Dollars ($1,000) for the payment of such costs and damages as may be suffered by any party who is found to be wrongfully enjoined or restrained herein, said bond to be approved by the clerk of this court.

The action will be retained on the docket for such further orders as may be necessary.

EDUCATION
Public Schools—Virginia

Eva ALLEN et al. v. County SCHOOL BOARD OF PRINCE EDWARD COUNTY, Virginia, et al.

United States Court of Appeals, 4th Circuit, November 11, 1957, No. 7463.

SUMMARY: One of the original *School Segregation Cases* (1 Race Rel. L. Rep. 5, 11) was returned with the mandate of the United States Supreme Court to the federal district court in Virginia. On the remand the three-judge district court entered a decree in the case requiring the admission of Negro children to schools in Prince Edward County, Virginia, without discrimination on the basis of race and with all deliberate speed. The court, however, retained jurisdiction of the case for the entry of further orders which might be necessary in the enforcement of the decree. *Sub nom. Davis v. School Board of Prince Edward County*, 1 Race Rel. L. Rep. 82 (E.D. Va. 1955). The plaintiffs then filed motions seeking an order to require the fixing of a definite time for desegregation of the county schools. Prior to action on these motions the original three-judge court dissolved itself and turned over the supervision of the case to a single judge. 142 F.Supp. 616, 1 Race Rel. L. Rep. 1055 (1956). The defendants then filed a motion for dismissal of the case on grounds that recently enacted Virginia legislation had provided an adequate remedy for the plaintiffs in the state. After hearings the district court denied both this motion and the prior motions of the plaintiffs. The court held that the plaintiffs would not be required to exhaust the state remedies under the circumstances of this case. The court also held that present conditions in the county, including public opinion unfavorable to desegregation and the possibility that schools would be closed, required that it defer entering an order fixing the time for desegregation. 149 F.Supp. 431, 2 Race Rel. L. Rep. 341 (1957). On appeal the Court of Appeals for the Fourth Circuit reversed and remanded the case with directions to the district court to enter a decree requiring the abolition of racial discrimination in school admission policies "without further delay."

Before PARKER, Chief Judge, HAYNSWORTH, Circuit Judge, and WATKINS, District Judge.

PER CURIAM.

This action was commenced to enjoin racial segregation in the public schools of Prince Edward County, Virginia, on the ground that provisions of the state constitution and statutory code requiring such segregation were violative of the 14th Amendment to the Constitution of the United States and therefore void. A court of three judges was properly constituted, as required by 28 USC sections 2281 and 2284, and judgment was entered denying the relief sought. See Davis v. County School Board of Prince Edward County, D.C., 103 F. Supp. 337. This judgment was reversed by the Supreme Court and the case was remanded for further proceedings. Brown v. Board of Education of Topeka 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 1083. On the remand the court of three judges, entered a decree which vacated and set aside its original decree, declared invalid the constitutional and statutory provisions requiring segregation in the schools, and enjoined and restrained the defendants from refusing on account of race or color to admit to any school under their supervision any child qualified to enter such school "from and after such time as the defendants may have made the necessary arrangements for admission of children to such school on a nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in this cause". The court found that it would not be practicable to require that this provision be made effective before the commencement of the school term in September 1955; but the finality and binding force of the order was not otherwise affected. The case was retained on the docket for the entry of further orders which might be necessary in the enforcement of the decree. In July 1956 the court of three judges was dissolved and order was entered that further proceedings in the case be had before a single District Judge. Davis v. County School Board

of Prince Edward County, D.C., 142 F. Supp. 616.

[*Three-Judge Court Not Needed*]

After the dissolution of the three judge court, the case came on for hearing before the District Judge on a motion of plaintiffs for an order fixing a time limit for compliance with the order theretofore entered, and a motion of defendants that the motions of plaintiff be dismissed for failure to comply with the Pupil Placement Act, ch. 70 of the Acts of Assembly of Virginia, Extra Session 1956. On the hearing of the motions, the question was raised as to whether the court of three judges should be reconvened. The District Judge held that the court of three judges need not be reconvened, declined to pass on the applicability of the Pupil Placement Act, and denied the motion for an order fixing a time limit for compliance with the order theretofore entered because of opposition to the order and racial tension prevailing in the community and the possible closing of the schools under Virginia Statutes, if the order were enforced.

[*Pupil Placement Act Inadequate*]

The holding of the judge that the three judge court need not be reconvened was unquestionably correct. We have recently held, however, that the Pupil Placement Act provides no adequate administrative remedy. (School Board of Newport News v. Atkins 4 Cir. 246 F. 2d 325, cert. den. U.S.); and we think that the District Judge was in error in not fixing a time limit for compliance with the order theretofore entered in the cause. As pointed out by Judge Joseph C. Hutcheson of Texas in Jackson v. Rawdon 5 Cir. 235 F. 2d 93, 96, plaintiffs were entitled to have the school board "acting promptly, and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration * * *." We quoted this with approval in School Board of City of Charlottesville v. Allen 4 Cir. 240 F. 2d 59, 64, where we said:

> "It had been two years since the first decision of the Supreme Court in Brown v. Board of Education and, despite repeated demands upon them, the boards of education had taken no steps towards removing the requirement of segregation in the schools which the Supreme Court had held violative of the constitutional rights of the plaintiffs. This was not 'deliberate speed' in complying with the law as laid down by the Supreme Court but was clear manifestation of an attitude of intransigence, which justified the issuance of the injunctions to dispel the misapprehension of school authorities as to their obligations under the law and to bring about their prompt compliance with constitutional requirements as interpreted by the Supreme Court."

In the case at bar the order entered on June 29, 1955, while finding that it was impracticable to place the schools on a nondiscriminatory basis before September 1955, enjoined the defendants "from refusing on account of race or color to admit to any school under their supervision any child qualified to enter such school, from and after such times as the defendants may have made the necessary arrangements for admission of children to such school on a nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in this cause." More than a year and a half had elapsed after the entry of this order, the school year of 1955-56 had come and gone, another school year had been entered, and no steps had been taken to comply with the order. The time had unquestionably come to say plainly to the defendants that they must comply without further delay.

[*Compliance Required*]

This does not mean that the defendants should require mixing of white and Negro children in the schools but merely that they should abolish the requirement of discrimination. If the children of the different races should voluntarily attend different schools, this would not be violative of the Constitution or of the court's order, so long as there was no requirement of the school authorities to that effect. Furthermore, it would not be necessary for the requirement as to segregation to be removed at once with respect to all grades in the schools, if a reasonable start were made to that end with "deliberate speed" considering the problems of proper administration. See order in the Arlington case, approved by this court, 240 F. 2d at 61, also Aaron v. Cooper 8 Cir 243 F. 2d 361.

The fact that the schools might be closed if

the order were enforced is no reason for not enforcing it. A person may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights.

The order appealed from will accordingly be reversed and the case will be remanded to the court below with direction to enter an order directing defendants to make a prompt and reasonable start toward complying with the court's order enjoining discrimination on the ground of race or color in admitting children to the schools under their supervision.

Reversed and Remanded with Directions.

EDUCATION
Public Schools—Virginia

William C. CALLOWAY, Jr., et al. v. Andrew A. FARLEY, Beverly H. Randolph, Jr., and Hugh V. White, individually and constituting the Pupil Placement Board of the State of Virginia, et al.

United States District Court, Eastern District, Virginia, September 18, 1957, Civ. No. 2616.

SUMMARY: Negro patrons of the schools of Richmond, Virginia, brought an action in federal district court against members of the state Pupil Placement Board and city school authorities. The action sought to enjoin the enforcement of the Virginia Pupil Placement Act (1 Race Rel. L. Rep. 1109) which requires that assignment of pupils to individual schools be made by the state board. The court issued a temporary order restraining the defendants from denying the plaintiffs the right to attend city schools solely on the basis that they had failed to apply to the board for enrollment or had not filed a "placement form."

HUTCHESON, District Judge.

ORDER

This day came the plaintiffs, by counsel, and moved the Court for a temporary restraining order based upon the allegations of their verified complaint, and it appearing that reasonable notice of the time and place of this motion has been given to defendants, who likewise appeared by counsel, and it appearing from concessions of counsel that the infant plaintiffs, through no fault of their own, are being denied the right and privilege of attending public schools or are threatened with immediate expulsion therefrom by virtue of the refusal of their parents or guardians to apply to the Pupil Placement Board for enrollment in accordance with the statutes and the rules and regulations of said Board, and the Court being of opinion that said infants will suffer irreparable and immediate injury by being denied the right to attend public schools,

It is ORDERED and DECREED that the said defendants Andrew A. Farley, Beverly H. Randolph, Jr., and Hugh V. White, individually and constituting the Pupil Placement Board of the State of Virginia, and defendants The School Board of the City of Richmond, Virginia, and H. I. Willett, Division Superintendent of Schools of the City of Richmond, Virginia, be, and they are hereby, temporarily restrained from denying the infant plaintiffs and other children similarly situated the right and privilege of attending the public schools of the City of Richmond, Virginia, because of the failure of their parents or guardians to apply to the Pupil Placement Board for enrollment, pending a determination of plaintiffs' application for a preliminary injunction by the full Court, or until the further order of this Court.

Enter this 18 day of September, 1957.

GOVERNMENTAL FACILITIES
Public Housing—Georgia

Prince HEYWARD et al. v. PUBLIC HOUSING ADMINISTRATION et al.

United States District Court, Southern District, Georgia, July 9, 1957, 154 F.Supp. 589.

SUMMARY: Negro citizens of Savannah, Georgia, brought a class action in federal district court against the federal Public Housing Administration and the Savannah Housing Authority and its officers. The complaint sought a declaratory judgment and an injunction to require the admission of the plaintiffs to a public housing project restricted to white persons, as well as money damages. Having granted a motion for summary judgment by the Public Housing Administration, the district court dismissed the action as to the Savannah Housing Authority, holding that the separate-but-equal public housing facilities for Negroes furnished the plaintiffs by the Housing Authority fulfilled their constitutional rights. 135 F.Supp. 217, 1 Race Rel. L. Rep. 347 (S.D. Ga. 1955). On appeal the United States Court of Appeals for the Fifth Circuit reversed in part and remanded. The court held that, as to the Public Housing Administration, substantial issues were raised by the plaintiffs which were not determined by the action on the motion for summary judgment and that plaintiffs were entitled to a trial on the question of the involvement of that agency in racial discrimination. As to the Savannah Housing Authority, the court held that the complaint stated a valid claim under the federal civil rights acts and should not have been dismissed without a trial on the merits. 238 F.2d 689, 2 Race Rel. L. Rep. 107 (1956). A trial was then had on the merits in the district court. At the opening of the trial the action was voluntarily dismissed as to all but one of the plaintiffs. The court found that the remaining plaintiff had not applied for admission to the housing project, that she was not entitled to preferential admission and that there was no proof that the defendants had refused her any preferential right to admission. The action was dismissed as to the remaining plaintiff also.

SCARLETT, District Judge.

The above stated case having come on to be heard without a jury, by the consent of all parties, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. This action was originally brought by eighteen individuals, on behalf of themselves and others similarly situated, in which they allege in substance; that Public Housing Administration and Savannah Housing Authority, pursuant to the provisions of the Housing Act of 1937, as amended, 42 U.S.C.A. § 1401 et seq., have constructed and agreed to construct, operate and maintain several public housing projects in the City of Savannah, some of which are and will be located on the site of the residences or former residences of the plaintiffs; that pursuant to the provisions of the National Defense Housing Acts, Public Housing Administration holds title to certain other public housing projects in Savannah which are operated by Savannah Housing Authority as Agent for Public Housing Administration; and that the entire public housing program in Savannah has been jointly planned, constructed, operated and maintained by Public Housing Administration and Savannah Housing Authority pursuant to the provisions of the aforementioned housing acts and the laws of the State of Georgia. In this connection plaintiffs allege that in administering the entire public housing program Public Housing Administration and Savannah Housing Authority have determined upon and presently enforce an administrative policy of racial segregation resulting in the designation of certain projects for occupancy by qualified white families and in the designation of other projects for occupancy by qualified Negro families; that it is the practice and policy of each of the defendants to require applicants for public housing to state a preference for admission to a particular project and "that this information is put on the application blank prepared for the purpose of taking applications for public housing and that such information is in fact and effect a device for discriminating against the plaintiffs and the members of the class which they represent,

solely because of their race or color;" and that pursuant to the racial segregation policy, plaintiffs and others similarly situated, solely because they are Negroes, are denied the rights and preference to occupy housing projects, included those operated by Savannah Housing Authority as agent for Public Housing Administration, which have been limited to white occupancy by the defendants. It is also alleged that each of the plaintiffs has been or will be displaced from the site of his or her residence, and adjacent areas which have been condemned by or on behalf of Savannah Housing Authority, for the purpose of constructing thereon certain low-rent housing projects, one of which is known as Fred Wessels Homes; that each of the plaintiffs meets all of the requirements established by law for consideration for admission and for admission to the project built on or to be built on the site of his or her former residence, and to certain other public housing projects in Savannah; all of which have been displaced from the site of any low-rent housing project or slum-clearing project initiated after January 1, 1947, and whose housing needs are not or were not as urgent as those of the plaintiffs, have been admitted to Fred Wessels Homes and to other projects limited to white occupancy, whereas each of the plaintiffs desires to live in Fred Wessels Homes, and each has been denied admission to Fred Wessels Homes, solely because of race and color, despite the fact that at the time said project was ready for occupancy, each of the plaintiffs had a preference for admission by virtue of the fact that each was or is among those having the greatest urgency of need among low-income families eligible for public housing in Savannah.

[*Relief Requested*]

Finally, it is alleged that each of the defendants is under a duty to discharge his or its duties in conformity with the Constitution, laws and public policy of the United States, and that plaintiffs have no adequate remedy at law to protect their "civil and constitutional right not to be discriminated against by the State and Federal Governments, solely because of race, in leasing an interest in real property." The relief prayed is that the Court declare the rights and other legal relations of the parties as to the subject-matter in controversy, and that the Court enjoin defendants and their agents: (1) from refusing to accept plaintiffs' applications for certain public housing projects; (2) from refusing to certify plaintiffs as eligible for certain housing projects; (3) from refusing to admit plaintiffs to any public housing unit for which they are eligible, solely because plaintiffs are Negroes; (4) from pursuing a policy of racial segregation in public housing; (5) from refusing to extend the statutory preferences for the admission of plaintiffs to certain projects; (6) from classifying plaintiffs and others similarly situated on the basis of race for any purpose with respect to their applications for or admissions to, or residence in, any public housing project; (7) from requiring plaintiffs to state a preference for admission to a particular project upon making application for admission to any public housing project; and (8) from segregating plaintiffs within any project to which they are admitted. Additional injunctive relief is prayed to enjoin Public Housing Administration from giving federal financial and other federal assistance to Savannah Housing Authority for the construction, operation or maintenance of any project which excludes plaintiffs and other Negroes similarly situated, solely because of race or color. Finally, plaintiffs pray that each of them be awarded damages in the amount of $5,000 against each and all of the defendants, and that the Court grant such other and additional relief as may appear to be equitable and just. The defendants by their answers denied all the material allegations of the plaintiffs' petition.

[*Dismissal as to Other Plaintiffs*]

At the opening of the trial, this action was voluntarily dismissed by all of the plaintiffs except plaintiff Queen Cohen.

2. Fred Wessels Homes was constructed and is owned and operated by defendant Housing Authority of Savannah, a municipal corporation organized under the Housing Authorities Law of Georgia (99 Georgia Code Ann. 1101 et seq.). This project was completed and ready for occupancy in 1954. It is one of six such low-rent housing projects constructed, owned and operated by the Housing Authority of Savannah. That authority is preparing to build another such project and is planning construction of still another low-rent housing project. In addition, the Housing Authority of Savannah owns and operates as low-rent housing projects two

projects which were constructed by defendant Public Housing Administration, an agency in the Executive Branch of the Federal Government, pursuant to the so-called "Lanham Act" (42 U.S.C.A. §§ 1521-1524), which authorized housing projects for persons engaged in national defense activities. The two Lanham Act projects have been conveyed by Public Housing Administration to the Housing Authority of Savannah for a consideration which amounts to the net income of those two projects for a forty-year period.

3. The period of time which elapsed from the displacement of persons formerly residing on the site of Fred Wessels Homes until the completion of that project and its readiness for occupancy was approximately two years. When the former occupants of the site were displaced, the Housing Authority of Savannah established an office on the site for the purpose of assisting such persons in obtaining other adequate housing accommodations and made dwelling units in other low-rent housing projects available to such persons. All displaced site occupants who applied to the Housing Authority of Savannah for such assistance and who were eligible to receive it were provided with other housing accommodations.

[*Plaintiff Not Displaced*]

4. The sole remaining plaintiff in the above stated suit, Queen Cohen, was not displaced from the site of Fred Wessels Homes as she never resided on the property where the project was constructed. She had occupied dwelling quarters across the street from the site and therefore she did not have a statutory preference as a result of the provisions of Title 42 U.S.C.A. § 1410(g), and she has not proved her right to occupy a dwelling unit in Fred Wessels Homes according to the provisions to Title 42 U.S.C.A. § 1415(8) (c).

5. The Court also finds that the plaintiff, Queen Cohen, never made an application for admission in the Fred Wessels Homes or any other public housing project in Savannah.

The above findings of fact require a judgment in favor of the defendant, Public Housing Administration and its officers, and Savannah Housing Authority, and its officers, as the evidence conclusively shows that the plaintiff, Queen Cohen, has failed to carry the burden of proof as required by law in that she has failed to prove by the preponderance of evidence that she ever made an application for admission in the Fred Wessels Homes. The proper parties who received these applications swore plaintiff never made an application, and the plaintiff herself was vague as to whom she made such application. See Transcript of Evidence pages 88 and 90.

The undisputed testimony of both plaintiff and defendants shows that she was not entitled to a statutory preference under Title 42 U.S.C.A. § 1410(g), as alleged in the complaint.

In view of the plaintiff Queen Cohen's failure to make out her case for the reasons hereinabove set forth, it will not be necessary at this time for the Court to rule on the other issues raised, or the other relief requested in the complaint.

CONCLUSIONS OF LAW

1. Plaintiff has failed to prove that she made an application for admission in the Fred Wessels Homes, or any other public housing project.

2. Plaintiff has failed to prove that either Savannah Housing Authority, and its Officers, or Public Housing Administration and its Officers have refused plaintiff any preferential right of occupancy under the Housing Act, or that as a matter of law she was entitled to a statutory preference.

An appropriate order will be entered dismissing plaintiff's action against Public Housing Administration and its Officers, and Savannah Housing Authority and its Officers.

PUBLIC ACCOMMODATIONS
Swimming Pools—Colorado

Opal Doris JERNIGAN, et al. v. LAKESIDE PARK COMPANY et al.

Supreme Court of Colorado In Department, August 26, 1957, 314 P.2d 693.

SUMMARY: Eight Negroes brought an action against the operators of a public amusement park in a Colorado state court in Jefferson County to recover statutory damages for having

been denied, on the basis of race or color, accommodation at the defendant's swimming pool. The action was based on Chapter 25 of the Colorado Revised Statutes, 1953.[a] A motion to have the plaintiffs state their causes of action individually in separate counts was sustained by the trial court. The defendants then moved to strike all claims except those of one plaintiff on grounds of redundancy. This motion was also sustained by the trial court. A motion by the plaintiffs to rehear was denied and they sued out a writ of error to the Colorado Supreme Court. The Supreme Court dismissed the writ of error as not having been taken from a final judgment, although it indicated that the motion to strike should not have been granted.

KNAUSS, Justice.

In the trial court plaintiffs in error were plaintiffs and defendants in error were defendants. We will refer to the parties as they there appeared, or by name.

Plaintiffs' original complaint alleged that they were "members of the Negro race, so-called." That on August 13, 1955 defendant Lakeside Park Company operated a public place of amusement, including a public swimming pool; that defendant Ede was an employee of Lakeside Park Company and a ticket seller at said swimming pool and that defendant Leo Peterson was an employee of said Lakeside Park Company, acting as Chief of Police in said place of amusement; that Peterson and Ede denied to plaintiffs "solely on the grounds of their race" admission to the swimming pool; it was also alleged that Plaintiffs Jernigan, Payne, Drew and Maddox demanded and were denied admission to said pool at 1:45 p.m., again at 2 p.m. and again at 5:10 p.m. on said date. Judgment was prayed for in the sum of $10,000.

To this complaint defendants filed a motion to require the plaintiffs to have their several claims "stated in separate counts", which motion was granted. Thereupon plaintiffs filed a sixty page complaint in which is set forth the separate claims of the plaintiffs, all based on the allegations of the original complaint, Jernigan, Payne, Drew and Maddox dividing their separate demands against the three defendants into nine separate claims; and the other plaintiffs dividing their demands into six separate claims. This amended complaint alleged the acts of the defendant were "contrary to the provisions of the statute in such case provided," and demanded judgment for $500 for each refusal of access to the pool against each of the defendants.

[*Motion to Strike*]

To this amended complaint defendants moved "that each and every allegation of the several claims of the several plaintiffs, save and except paragraphs 1, 2, 3, 4, 5 and 6 of the first claim of Opal Doris Jernigan be stricken from the amended complaint" as redundant, immaterial and impertinent." On presentation of this motion the trial court determined "that the action herein is statutory for the recovery of a penalty, and that the motion is well taken." The trial judge thereupon sustained the motion and these portions of the amended complaint were stricken.

The trial court and counsel apparently overlooked our recent decision in Western Homes, Inc., v. District Court, 133 Colo. 304, 296 P.2d 460, where the provisions of our Rule 20(a), Rules of Civil Procedure relating to multiple plaintiffs and defendants in actions involving common questions of law or fact are discussed.

In the order it is stated "to the end and effect

a. Article I of that Chap. provides in part:

25-1-1. Equality of privileges to all persons.—All persons within the jurisdiction of the state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land or water, theaters, and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.

25-1-2. Penalty and civil liability.—Any person who shall violate any of the provisions of section 25-1-1 by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, for every such offense shall forfeit and pay a sum of not less than fifty dollars nor more than five hundred dollars to the person aggrieved thereby, to be recovered in any court of competent jurisdiction in the county where said offense was committed; and also for every such offense be deemed guilty of a misdemeanor; and upon conviction thereof, shall be fined in any sum not less than ten dollars, or more than three hundred dollars, or shall be imprisoned not more than one year, or both. A judgment in favor of the party aggrieved, or punishment upon an indictment or information shall be a bar to either prosecution, respectively.

that plaintiffs jointly may assert the one claim for the recovery of a single penalty against any one or more of the named defendants." A motion to rehear the matter was denied and plaintiffs bring the case here on writ of error. There the record ends. No answer was ever filed, no trial was had and no judgment of any kind appears in the record.

It is a well settled rule that a writ of error will lie only to a final judgment. Here we have none. Rulings on motions directed to pleadings which do not result in a final judgment entered of record cannot be made the basis for a writ of error. Accordingly the writ of error is dismissed.

MOORE, C. J., and SUTTON and FRANTZ, JJ., concur.

PUBLIC MEETINGS
Interracial—Virginia

Faith BISSELL v. COMMONWEALTH of Virginia

Supreme Court of Appeals of Virginia, October 14, 1957, Record No. 4716.

SUMMARY: The defendant, a white woman, was tried in a Virginia state court on a charge of violating a Virginia statute requiring the segregation of white persons and Negroes in any public halls or assemblages. The specific violation charged was that the defendant had taken a seat in a section reserved for Negroes at a political meeting in a high school auditorium. She was found guilty and fined $15. The trial court filed a memorandum opinion in which it stated that the doctrine of "separate-but-equal" as applied to racial segregation in the case of *Plessy v. Ferguson* had been specifically overruled in the *School Segregation Cases* only with respect to public education and that the doctrine continued to be applicable to the type of segregation involved in this instance, absent a specific ruling by the United States Supreme Court. 2 Race Rel. L. Rep. 446 (1957). On appeal the Supreme Court of Appeals of Virginia reversed on grounds that the warrant of arrest was defective, without reaching the constitutional question.

WHITTLE, Justice.

Faith Bissell was arrested, tried and convicted in the County Court of Arlington County on a warrant which read:

"Commonwealth of Virginia, Arlington County, to-wit:
"To the Sheriff or any Peace Officer of the said County:
"WHEREAS Major Fawver of the said County, has this day made complaint and information on oath before me, the undersigned Special Justice for the said County, that Faith Bissell did, on the 1st day of November, 1956, in said county fail, while in a Public assemblage at Thomas Jefferson Junior High School in Arlington County, to take and occupy the seat assigned to her by an usher and failed to obey the request of such usher as aforesaid and failed to obey the request of Major Fawver Arlington County Police to change her seat as the occasion required. Unlawfully and against the peace and dignity of the COMMONWEALTH. These are, therefore, in the name of the COMMONWEALTH OF VIRGINIA, to command you forthwith to apprehend and bring before the Judge of the County Court the body of the said defendant named above to answer the said complaint, and to be further dealt with according to law, and to summon the witness named on the back hereof to appear on the next day following the arrest.
"Given under my hand and seal this 1st day of Nov., 1956.
"Eugene C. Adkins, Special Justice."

A fine of $15.00 was assessed against the defendant; an appeal from this judgment was had to the circuit court; whereupon, at the request of

the defendant and with the consent of the court and the Commonwealth, the court heard the case without the intervention of a jury. Upon this hearing an order was entered finding the defendant guilty "as charged in the warrant" and imposing a fine of $15.00, from which order we granted a writ of error.

After the evidence had been presented in the circuit court, the defendant moved to strike the evidence and to dismiss or quash the warrant upon the ground that sections 18-327 [1] and 18-328 [2], Code of Virginia, 1950, were unconstitutional in that they violated the First and Fourteenth Amendments to the Constitution of the United States.

[*Other Grounds for Decision*]

While the circut court, in dealing with this motion, sustained the constitutionality of the statutes, in our view of the record it was not necessary to pass upon the constitutional question for the reason that the warrant of arrest fails to charge a crime. As will be seen from the face of the warrant it nowhere indicates the race or color of the defendant; it does not allege that the defendant, in violation of Code, §18-328, had failed to take and occupy a seat assigned to her under the provisions of §18-327; nor does it allege that in these or any other respects the conduct of the defendant violated § 18-328. In fact, the warrant fails to allege any offense prohibited either at common law or by statute. While in this jurisdiction the same particularly is not required in warrants of arrest as is required in formal indictments, they must, nevertheless, point out the offense for which the defendant is to stand trial. Old v. Commonwealth, 18 Gratt (59 Va.) 915, 930; Lacey v. Palmer, 93 Va. 159, 173, 24 S. E. 930, 57 Am. St. Rep. 795, 31 L.R.A. 822; Commonwealth v. Doss, 159 Va. 968, 167 S. E. 371; Smith v. Commonwealth, 160 Va. 943, 169 S. E. 550; 19 M.J., Warrants, § 3, p. 550.

The defendant did not testify nor did she introduce witnesses in her behalf. Five witnesses were introduced by the Commonwealth, none of whom was questioned regarding the race or color of the defendant. Thus, according to the record before us, the race or color of the defendant was neither alleged in the warrant nor proved by the evidence.

In appellate proceedings this court sits to review and correct errors of trial courts, and in exercising this jurisdiction we are limited to the record of the proceedings which have taken place in the trial court and have been there settled and certified to us. U. S. Mineral Co. v. Camden, 106 Va. 663, 666, 56 S. E. 561, 117 Am. St. Rep. 1028; Ward v. Charlton, 177 Va. 101, 107, 12 S. E. 2d 791; 1 M.J., Appeal and Error, § 189, p. 619.

It was conceded in argument before us that the defendant's conduct on this occasion was for the purpose of testing the constitutionality of §§ 18-327 and 18-328.

1. "§ 18-327. DUTY TO SEPARATE RACES AT PUBLIC ASSEMBLAGE.—Every person, firm, institution or corporation operating, maintaining, keeping, conducting, sponsoring or permitting any public hall, theatre, opera house, motion picture show or any place of public entertainment or public assemblage which is attended by both white and colored persons shall separate the white race and the colored race and shall set apart and designate in each such public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage certain seats therein to be occupied by white persons and a portion thereof, or certain seats therein, to be occupied by colored persons and any such person, firm, institution or corporation that shall fail, refuse or neglect to comply with the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense. (1926, p. 945; Michie Code, 1942, § 1796a.)"

2. "§ 18-328. FAILURE TO TAKE PLACE ASSIGNED IN PURSUANCE OF PRECEDING SECTION.—Any person who fails, while in any public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage, to take and occupy the seat or other space assigned to them in pursuance of the provisions of the preceding section by the manager, usher or other person in charge of such public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage or whose duty is to take up tickets or collect the admission from the guests therein, or who shall fail to obey the request of such manager, usher or other person, as aforesaid, to change his seat from time to time as occasion requires, in order that the preceding section may be complied with, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars nor more than twenty-five dollars for each offense. Furthermore, such person may be ejected from such public hall, theatre, opera house, motion picture show or other place of public entertainment or public assemblage by any manager, usher or ticket taker, or other person in charge of such public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage, or by a police officer or any other conservator of the peace, and if such person ejected shall have paid admission into such public hall, theatre, opera house, motion picture show or other place of public entertainment or public assemblage, he shall not be entitle to a return of any part of the same. (1926, p. 946; Michie Code 1942, § 1796b.)"

It was urged on her behalf that this court disregard the manifest invalidity of the proceedings and the lack of proof, and decide the constitutional question regardless. This we must decline to do.

One of the most firmly established doctrines in the field of constitutional law is that a court will pass upon the constitutionality of a statute only when it is necessary to the determination of the merits of the case. This principle is recognized by appellate courts generally. Wood v. Quillin, 167 Va. 255, 260, 261, 188 S. E. 216; Commonwealth v. Doss, supra; 4 M.J., Constitutional Law, §60, pp. 150, 151; Ohio River & W. Ry. Co. v. Dittey, 232 U. S. 576, 58 L. ed. 737, 34 S. Ct. 372; Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 104, 65 S. Ct. 152, 89 L. ed. 101; 11 Am. Jur., Constitutional Law, § 93, p. 720 and cases cited under Footnote 1 page 721.

For the reasons stated the judgment of conviction is reversed and the warrant dismissed. (§ 19-261, Code, 1950)

Reversed and dismissed.

EMPLOYMENT
Labor Unions—Federal Statutes

Lee OLIPHANT et al. v. BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN et al.

United States District Court, Northern District, Ohio, September 27, 1957, Civ. No. 31464.

SUMMARY: Several Negroes employed as firemen by various southern railroads brought an action in federal district court against the Brotherhood of Locomotive Firemen and Enginemen and some of its local unions. The Brotherhood is certified as exclusive bargaining representative for the firemen under the federal Railway Labor Act but does not admit Negro firemen to membership in the union. The action sought to require the admission of the Negro firemen to membership on the ground that discriminatory representation by the Brotherhood of the Negro firemen deprived them of liberty without due process of law in violation of the Fifth Amendment to the United States Constitution. The court stated that discrimination, if it existed, resulted from policies of the railroad employers, who were not parties to the suit. It held that the Railway Labor Act does not prevent discrimination on the basis of race in admission practices of unions certified as bargaining representatives under the Act; that the certification of the Brotherhood under the Act does not constitute the Brotherhood a federal agency; and that the failure to prevent such discrimination is not "federal action" so as to be a deprivation of liberty or property without due process of law under the Fifth Amendment. The court stated that the plaintiffs' remedies are legislative rather than judicial and denied the relief requested.

JONES, District Judge.

This is an action brought by several negro firemen employed by various southern railroads seeking an order from this Court compelling the Brotherhood of Locomotive Firemen and Enginemen to admit them to membership. The Brotherhood has been certified as exclusive bargaining representative for these men, but the constitution of the Brotherhood forbids the admission of negroes to membership. It is the plaintiff's position that the Brotherhood has never represented the negro workers on equal terms with the white workers, that the United States Supreme Court in Steele v. Louisville and Nashville R. R., 323 U.S. 192, recognized at least one instance of this unequal treatment and ordered the Brotherhood to cease this discrimination, and that the Brotherhood continues to exercise discrimination in its representation, particularly in (1) reducing the minimum mileage requirements for firemen, which has the effect of reducing the monthly income of the negroes; (2) applying the "gouge"

rule in such a way as to reduce earnings of the negroes; (3) applying the mileage rules to firemen and not to demoted engineers; and (4) bargaining for a compulsory retirement at age 70. For reasons which shall appear later, these alleged acts of discrimination will not be discussed in detail, but it should be noted that as to (3) above, proof was mainly in the form of opinion and was denied by Brotherhood officials, while (1), (2) and (4) are legitimate practices used by most unions for reasons other than discrimination, and since they apply to all who come within the terms of the rule involved, whether the individuals are white or colored, this Court cannot state definitely that this Brotherhood adopted these practices for the purpose of discrimination against the negroes. It should be further noted that it is clear that all the alleged unequal treatment which has resulted in years of litigation between the negro firemen and the Brotherhood was made necessary by the long-standing rule of the railroads that engineers must have three years experience as firemen, and the further rule that negroes may not become engineers. Thus, after a time, the negro firemen had become the senior firemen, having the right to choice runs, and all the other seniority rights, and it became difficult for the railroads to train prospective engineers. The attempts by the railroads and the Brotherhood to train a sufficient supply of competent engineers are the alleged acts of discrimination involved in this case and in the Steele case, supra. The basic act of discrimination, from which all the others necessarily followed, was the rule, of the railroads that negroes may not become engineers. Yet when the Brotherhood in 1948 attempted to remove this obstacle of nonpromotability, two suits, Palmer v. Southern Railway, et al., U.S.D.C. at Washington, D. C., and Salvant v. Louisville and Nashville R. R., et al., U.S.D.C. at Louisville, Ky., were brought to enjoin any such attempt by the Brotherhood to render negro firemen subject to the same rules of promotion as were white firemen. These cases, along with many others were settled together, one of the conditions of the settlement being the agreement of the Brotherhood that it would not attempt to make firemen eligible as engineers. A very interesting history of this whole problem is to be found in Rolax v. Atlantic Coast Line R. R., et al., 91 F. Supp. 585, and another treatment in 1953 Wisconsin Law Review 516.

In the view I take of the issues for consideration, the factual questions respecting inequality, discrimination and other related complaints presented in evidence have no bearing upon the single question to be resolved.

[*Facts of Discrimination*]

The essential facts are that the plaintiffs are not eligible to membership in the defendant as exclusive bargaining agent for the class to which they belong and that the Congress has made no provision in the Railway Labor Act requiring that membership in the exclusive bargaining agent be made available to all employees of the class regardless of race or color.

It is the plaintiffs' claim that Congress having made no provision therefor, this Court, sitting in equity, has the power to compel what the Congress has failed to provide. There is no question that the evidence presented establishes the fact that these plaintiffs and the members of their class are discriminated against in respect of their representation and participation; their conditions of employment, and other matters relating to such employment.

The plaintiffs claim that the fact that membership in the defendant organization is not available to them because they are not white born is the principal reason why they do not receive equal consideration, treatment and service by the defendant as bargaining agent for the employees of the railroad where these plaintiffs and their class are employed; that they are controlled and ostensibly represented by the defendant as bargaining agent without real participation, or without participation in any effective degree, such as are the members of the defendant Brotherhood.

There can be no real assurance that membership in the defendant would prevent discrimination, since it is my opinion under the evidence here that the effective discrimination is by the railroad employer, rather than by the brotherhood, and the railroad employers are not parties to the action.

[*Application of School Cases*]

In detail, plaintiffs in this action seek an order compelling the defendant Brotherhood and its officers to admit plaintiffs to membership privileges in the Brotherhood. They base their right to such relief upon the doctrine of Steele v. L. & N. R. R., *supra*, to the effect that the

Brotherhood must afford representation to members and nonmembers equally and without regard to race or color; upon the principle of Brown v. Board of Education, 347 U. S. 483, that the maintenance of segregated public schools by states denies the equal protection of the laws to their citizens; upon the pronouncement of Bolling v. Sharpe, 347 U. S. 497, that the due process clause of the Fifth Amendment is comparable to the equal protection clause of the Fourteenth Amendment; and upon a showing of actual discriminatory representation by the Brotherhood. They claim that the remedy granted in the Steele case is not adequate and that the privileges of membership are necessary to enable them to achieve equality of representation.

It is true, as defendants suggest, that the school segregation cases were based upon the equal protection clause of the Fourteenth Amendment, which is a limitation on state action, and that the Fifth Amendment, which is the comparable limitation on Federal action, contains no such clause. However, the case of Bolling v. Sharpe, *supra*, stands for the proposition that segregated schooling deprives the negro (and the white) of liberty without due process of law.

[*"Federal Action" Required*]

From this it appears that if Federal action is responsible for discriminatory practices in labor relations, and such discrimination deprives citizens of life, liberty, or property without due process of law, then such Federal action is repugnant to the Constitution.

The state action involved in the school cases was the maintenance by the state of segregated public schools. The Federal action involved in this case is the certification of a labor union as exclusive bargaining representative. Obviously it is not Congress which requires that negroes be denied membership in the union, but the union itself. The question involved here is whether Congress should require the admission of negroes to membership in unions which are certified as exclusive bargaining agent.

That Congress did not intend to require admission of negroes to membership is obvious. It is impossible to interpret the legislative intent in this situation in such a manner as to avoid the constitutional question. When the union shop amendment to the Railway Labor Act, 45 U. S. C. Sections 151 *et seq.*, was being discussed and considered by Congress, Senator Jenner of Indiana proposed an amendment which provided that railway labor organizations which denied membership on the basis of race or color would be refused certification as exclusive bargaining representative so long as such conditions were enforced. (Pp. 16536, 16537, 17241, Congressional Record, 81st Congress, 2nd Session). This proposed amendment was tabled. The Act itself is silent on the subject. Thus, if the due process clause guarantees the right to membership without regard to race or color in a labor organization which is certified as exclusive bargaining representative, then certifications of unions which do deny membership on this basis must be declared invalid.

[*Membership as Basis of Rights*]

Missouri ex rel. Gaines v. Canada, 305 U. S. 337, which was decided under the old "separate but equal" doctrine of Plessy v. Ferguson, 163 U. S. 537, declared that if separate facilities for negroes were not in fact equal, then colored students must be admitted to white schools. Thus, maintain the plaintiffs, if actual unequal representation is shown in this case, then the Court under the Gaines case may order this Brotherhood to admit these plaintiffs to membership, without declaring that all negroes must be admitted to membership in all exclusive bargaining representatives. However, if the school cases are analogous to this situation, the newer Brown doctrine of "separate cannot be equal" must control here as well. If membership in the certified representative is necessary to insure that the negro firemen will not be deprived of life, liberty, or property without due process of law, then the presence or absence of actual unequal treatment by the representative is immaterial, just as the existence of separate schools, regardless of equality or inequality of facilities and standards, denies to citizens the equal protection of the laws.

[*Brotherhood Not Federal Agency*]

The real question is whether Federal action has deprived these negro citizens of liberty or property without due process of law. It is the considered judgment of this Court, without dealing with the question of whether the alleged right to become a member of a labor organization certified as exclusive bargaining representative is

concerned with liberty or property, that sufficient Federal action is not shown to enable the courts to declare the Railway Labor Act, or any part thereof, an unconstitutional deprivation of liberty or property. The purpose of the Act was and is to promote industrial peace. Apparently the Act itself would not have been acceptable to the Congress if negro membership in the agent had been required. In short, the representatives of all the people could not agree that any control over the membership policies of the agents certified was essential to the major purpose of the Act. However, experience does not remove the taint of unconstitutionality, if such there be.

[*Remedy Legislative*]

As is mentioned above, the Federal action taken by an agency of the Congress, was the certification of the Brotherhood of Locomotive Firemen and Enginemen as exclusive bargaining representative for the bargaining unit involved, which included persons who were not acceptable to membership under the Constitution of the Brotherhood. Actions by the Brotherhood can be attributed to the Congress only if the act of certification clothes the Brotherhood with some or all of the attributes of a Federal agency. The Court is satisfied that this Act is not sufficient to change the character of the organization from that of a private association to that of a governmental agency.

The Court can feel that a situation is unjust and may need some remedial action, but unless upon sound equitable principles relief can be granted, the remedy does not lie with the courts. Certainly voluntary action by the defendant or Congressional legislation present the only corrective where a manifest inequality exists. It is pressed upon me that trends and policy with respect to rights not hitherto receiving adequate legislative sanction and security give support and direction to judicial mandate for the accomplishment of the plaintiff's prayer and purpose here. But I cannot accept such a representation as valid without legislative action. To compel by judicial mandate membership in voluntary organizations where the Congress has knowingly and expressly permitted the bargaining agent to prescribe its own qualifications for membership would be usurping the legislative function. The Congress has entered the field of, and made provision for, labor relations and furnished means of adjusting labor disputes between employers and employees of interstate railways. For injustices due to discrimination or inadequate representation and participation to employees who are not members of the bargaining agent, the employees must look to the legislative, not the judicial branch of constitutional government.

Accordingly, for the reason that there is not sufficient Federal action to render the membership policies of this Brotherhood subject to judicial control, plaintiffs must be denied the relief requested.

This memorandum is considered compliance with Rule 52(a).

TRIAL PROCEDURE
Argument of Counsel—New York

Zonovia REYES, Committee of the Estate of Pedro Reyes, Incompetent v. ARTHUR TICKLE ENG. WORKS, Inc., et al.

Court of Appeals of New York, July 3, 1957, 3 N.Y.2d 837, 166 N.Y.S.2d 78, 144 N.E.2d 723.

SUMMARY: In a personal injury action brought on behalf of a Puerto Rican in a New York state court the defendant's attorney, in his closing argument, referred to a witness for the plaintiff as a "Puerto Rican the same as the plaintiff" who was "trying to help the plaintiff" in the case. Following a verdict for the defendants the trial court granted a motion to set aside the verdict and grant a new trial on grounds that the argument of counsel was prejudicial and constituted an appeal to racial prejudice. On appeal to the Supreme Court, Appellate Division, it was held, two judges dissenting, that the remarks of counsel were fair comment on the testimony of a witness and not an appeal to racial prejudice. The verdict was directed to be reinstated. 152 N.Y.S.2d 698, 2 Race Rel. L. Rep. 437 (1956). On appeal to the New York Court of Appeals the judgment was affirmed in a per curiam decision without opinion.

TRIAL PROCEDURE
Petit Juries—Texas

Robert L. BARRY v. The STATE of Texas

Court of Criminal Appeals of Texas, January 9, 1957 (Rehearing denied March 6, 1957), 305 S.W.2d 580.

SUMMARY: Following a conviction for rape in a Texas state court the defendant appealed to the Court of Criminal Appeals. One ground of appeal was that a prospective juror, a Negro, was excused from jury service, apparently because he was a Negro and there were no facilities available to feed and house a racially-mixed jury. The Court of Criminal Appeals affirmed, one justice dissenting, stating that since the defendant had not shown himself to be a Negro he could not be heard to complain of the excusing of a Negro venireman. The dissenting justice would have held that discrimination against one venireman because of race was a denial of the equal protection of the law to the defendant regardless of his race. Part of the opinion of the Court, by Presiding Justice MORRISON, together with the dissenting opinion and the opinion of the Court on denial of rehearing, is set out below.

The offense is rape; the punishment, 50 years.

* * *

We shall discuss the evidence more fully in connection with the bills of exception so ably presented by appellant's counsel in brief and argument.

The State, even though assisted by private prosecution, has not favored this Court with a brief.

Bill of exception No. 1 relates to the trial court excusing the venireman Broadnax, a colored man. There is no showing in this record that the appellant is a member of the colored race, nor is it shown that appellant was prejudiced by the juror being excused.

In two recent cases, the question of alleged discrimination against women in jury selection has been before this Court. In Rogers v. State, Tex.Cr.App., 289 S.W.2d 923, we pointed out that the accused belonged to a different sex from the excused jurors. In Winfield v. State, Tex.Cr. App., 293 S.W.2d 765, certiorari denied October 8, 1956, 352 U.S. 846, 77 S.Ct. 51, 1 L.Ed.2d 53, we referred to the recent opinion of this Court in Alexander v. State, 160 Tex.Cr.R. 460, 274 S.W.2d 81, certiorari denied 348 U.S. 872, 75 S. Ct. 108, 99 L.Ed. 686, and the annotation which appears in 9 A.L.R.2d 611. From these authorities, we concluded that the majority rule required the accused to be a member of the class against whom discrimination is alleged before he may be heard to complain. In the Winfield case, we said [293 S.W.2d 768], "We conceive it our duty, unless very strong circumstances impel us to do otherwise, to hold with the great weight of authority."

Since the appellant has not shown himself to be a member of the colored race or shown any injury therefrom, he cannot be heard to complain that the venireman Broadnax, a colored man, was excused from jury service. Alexander v. State, supra.

* * *

Finding no reversible error, the judgment of the trial court is affirmed.

[*Dissent*]

DAVIDSON, Judge (dissenting).

Venireman Broadnax, a Negro, was duly drawn as a member of the venire from which the jury in this case was to be selected. He was, in all things, qualified under the Constitution and laws of this state for jury service. He was not shown to be disqualified to serve on the jury in this case.

Over appellant's objection and at the request of the state, the trial court dismissed Broadnax from the venire list and from jury service because he was a member of the Negro race and because of the absence of facilities to house and feed a jury composed of members of both the white and Negro races.

In Rogers v. State, Tex.Cr.App., 289 S.W.2d 923, and Winfield v. State, Tex.Cr.App., 293 S.W.2d 765, by dissenting opinions, I attempted to make it clear that, to my mind, the arbitrary refusal to call women for jury service or empanel women therefor after being called was

violative of the Constitution and laws of this state and of due process under both State and Federal Constitutions. In those cases, women were discriminated against and denied the right of jury service because of their sex.

[*All Negroes May Be Excluded*]

In the instant case, as has been stated, the juror was discriminated against and denied the right of jury service because he was a member of the Negro race.

If one member of the Negro race may be arbitrarily dismissed and disqualified for jury service because of his race, it necessarily follows that all members of the Negro race may be so treated.

It is now the settled law of this state that one accused of crime has no right to demand that the jury before or by whom he is to be tried shall be drawn and selected, fairly, from a cross section of all those who are qualified under the law to serve as jurors, without reference to any particular race, sex, nationality, or membership in established groups or classes.

It has often been said that it is a poor rule that will not work both ways. Now if an accused cannot demand that the jury be selected from those qualified for jury service without reference to sex, race, or class—as my brethren hold—then, by that same rule, the accused would have the right to demand that he be tried before a jury selected only from those who come within the same sex, race, or class of which he is a member.

Thus is demonstrated, to my mind, the utter fallacy of the rule of law which my brethren have announced.

I cannot help wondering what my brethren would hold if a member of the Negro race were to insist that only members of the Negro race be drawn for jury service, or if a woman were to insist that she is entitled to be tried by a jury composed only of women, or a white male were to insist that only white male persons compose the jury before whom he is tried. I am at a loss to understand how my brethren, under their holding here, could fail to recognize such insistence.

If the accused can complain only that members of his race, sex, or class are denied jury service, then, in order that such right to complain be preserved, the jury must be selected from those groups and none other. Only in that manner would the accused be accorded his right to prevent unjust discrimination.

My brethren justify their position, and the situation in which they have placed themselves, by saying that the accused is denied equal protection of law, as guaranteed by State and Federal Constitutions, only when he is a member of the class against which the discrimination is practiced.

[*Right of Defendant*]

The complaint which the appellant is here registering and of which Rogers and Winfield complained was not that they, as members of a certain race, sex, class, or group, had been discriminated against in the drawing of the jury, but that they were entitled to have a jury drawn from all those persons having the qualifications of jurors under the law, without reference to race, sex, nationality, groups, or classes to which the accuseds belong.

By Art. XVI, Sec. 19, of our State Constitution, Vernon's Ann.St., the legislature is enjoined to "prescribe by law the qualifications of grand and petit jurors." The only limitation there placed upon that power of the legislature was that "neither the right nor the duty to serve on grand and petit juries shall be denied or abridged by reason of sex."

In view of that constitutional provision, I was —and am still—amazed at the holding of my brethren in the Rogers and Winfield cases, because women were there permitted to be discriminated against for jury service solely because of their sex.

To me, the fallacy of the holding here and in the Rogers and Winfield cases is thus demonstrated. My brethren have wholly misapplied the due protection clause of the Constitutions to the instant fact situation. It has no application here.

The race discrimination here practiced was not against the accused. The discrimination was against the juror. By that discrimination, appellant was denied his constitutional right of due process of law.

I respectfully dissent to the affirmance of this conviction.

[*Opinion on Motion to Rehear*]

On Appellant's Motion for Rehearing.

WOODLEY, Judge.

Appellant complains that his bill of exception relating to the excusing of the juror Ed Broadnax

should not have been disposed of solely on the question of whether there was racial discrimination and whether or not he was in position to complain of discrimination against jurors of the colored race.

[*Use of Peremptory Challenges*]

The bill of exception will be reconsidered in the light of appellant's contention: "In this case the State did not exercise its challenge, and the Court's action in excusing the prospective juror without cause was in violation of the Articles above cited art. 612 et seq., V.A.C.C.P., and, in effect, gave the State sixteen peremptory challenges."

The bill of exception certifies that the prospective juror, Ed Broadnax, was examined and found to be qualified; that before exercising its right of challenge the State requested the court to excuse Broadnax ("he being a colored man"); that at the time Broadnax was examined the State had exercised 13 peremptory challenges and that the court excused Broadnax over appellant's objection.

The bill further certifies that at the time Broadnax was excused eleven jurors had been sworn and had he not been excused appellant, who had only one peremptory challenge left, would have accepted Broadnax.

The bill further shows that there were 46 remaining veniremen available.

The State was entitled to challenge 15 jurors without assigning any reason therefor. Arts. 614 and 615, V.A.C.C.P.

Thirteen such peremptory challenges had been used before Broadnax was excused at the State's request.

The appellant had no vested right to have Juror Broadnax, and the State had the statutory right to peremptorily excuse 15 veniremen. This is so because the State and an accused have a right to reject but never have a right to select any particular juror. McMurrin v. State, 156 Tex. Cr.R. 434, 238 S.W.2d 632, certiorari denied 342 U.S. 874, 72 S.Ct. 115, 96 L.Ed. 657 and Ross v. State, 157 Tex.Cr.R. 371, 246 S.W. 2d 884, certiorari denied 343 U.S. 969, 72 S.Ct. 1067, 96 L.Ed. 1365.

There is nothing in the bill of exception or in the record to show that after Broadnax was excused the State used another peremptory challenge.

In the absence of a showing that the State used fifteen challenges in addition to having Broadnax excused, we cannot agree that the excusing of the Juror Broadnax in effect allowed the State to use sixteen peremptory challenges in violation of art. 615, V.A.C.C.P.

Our attention is directed to that portion of Bill of Exception No. 11 wherein it reads: "That in the opinion of the witness, the operation in 1949 was a success, and that the defendant had been completely sterile ever since.

"That none of the foregoing testimony was controverted or rebutted in the slightest degree; that it was a scientific impossibility that the defendant could have deposited live spermatozoa in the vagina of the prosecutrix as was found on examination by the witness Dr. Smith; that the verdict of the jury was based entirely upon bias and prejudice and was without support in the evidence."

We do not interpret this as a certification of the trial judge that the verdict was not supported by the evidence but was based upon bias and prejudice. On the other hand, it appears that the language quoted was a part of appellant's contention "that there was no evidence of probative value upon which the jury could base a conviction."

Appellant's motion for rehearing is overruled.

REAL PROPERTY
Restrictive Covenants—Colorado

CAPITOL FEDERAL SAVINGS AND LOAN ASSOCIATION et al. v. Ulysses S. SMITH et al.

Supreme Court of Colorado, October 7, 1957, 316 P.2d 252.

SUMMARY: Negro property owners in Colorado brought an action in a state court to quiet title to their property and for a declaratory judgment. The action was brought on the ground that a predecessor in title had entered into a racially restrictive covenant regarding their

property which placed a cloud on their title. The restrictive covenant was an agreement made by owners of a designated tract of land, which included plaintiffs' lot, that no owner or subsequent purchaser or owner of the land would sell the property to "any colored person." The enforcement of this covenant was to be by forfeiture to the non-violating owners in the tract or by suit by other property owners for damages or specific performance. The court in which the action was brought entered a decree adjudging the restrictive covenant to be "completely nonenforceable and without effect." Since the judicial enforcement of the agreement would be a violation of the Equal Protection Clause of the Fourteenth Amendment, the lower court declared its enforceability removed as a cloud upon plaintiffs' title. *Sub nom., Smith v. Clark*, 2 Race Rel. L. Rep. 200 (1956). On appeal the Colorado Supreme Court affirmed. Such covenants, the appellate court declared, do not change their character whether denominated "executory interests" or "future interests" and no rights, duties or obligations can be based thereon.

KNAUSS, Justice.

For convenience we shall refer to the parties to this writ of error as they appeared in the trial court, where defendants in error were plaintiffs and plaintiffs in error were defendants.

Two claims were stated in plaintiff's amended complaint, one for a decree quieting title to real property, a second to obtain a declaratory judgment. Plaintiffs alleged that they were the owners of and in possession of certain lots in Block 6 Ashley's Addition to Denver and that on May 9, 1942 certain owners of lots in said Block, including plaintiff's predecessors in title, entered into an agreement among themselves that the lots owned by them should not be sold or leased to colored persons and providing for forfeiture of any lots or parts of lots sold or leased in violation of the agreement to such of the then owners of other lots in said block who might place notice of their claims of record. Plaintiffs further alleged that they were colored persons of negro extraction and that any interest, or claim of any interest of defendants, under said agreement was without foundation of right and in violation of the Constitution of the United States and that said agreement was a cloud on defendant's title which should be removed. Plaintiffs prayed for a complete adjudication of the rights of all parties to the action. Defendants placed of record in the office of the Clerk and Recorder of the City and County of Denver a Notice of Claim asserting that they were owners of lots in said Block 6 embraced in the agreement above mentioned and asserted title to the property which is the subject matter of the complaint by virtue of said agreement. By their answer and counterclaim defendants alleged that they were the owners and entitled to the possession of the real estate described in the complaint by virtue of the forfeiture provisions in the above mentioned agreement, and prayed for a complete adjudication of the rights of all parties and a decree quieting their title to the property in question.

All facts were stipulated and trial was to the court.

[*Decree Entered*]

The trial court entered a decree and Declaratory Judgment pursuant to Rules 105 and 57, R.C.P.Colo. The court found that the plaintiffs were the owners in fee simple of the property described in the complaint and quieted their title thereto free and clear of any right of enforcement or attempted enforcement of the restrictive covenant or the Notice of Claim filed by defendants. The court further adjudged and decreed that the restrictive covenant "may not be enforced by this court as a matter of law, as to enforce same by this court would be a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution, and the enforceability of same is hereby removed as a cloud upon the title of plaintiffs * * *." From the judgment and decree so entered the defendants bring the case here on writ of error.

[*Covenant*]

The covenant or agreement under consideration was dated May 9, 1942 and the several signatories to the contract agreed for themselves, their heirs and assigns "not to sell or lease the said above described lots and parcels of land owned by them respectively * * * to any colored person or persons, and covenant and agree not to permit any colored person or persons to oc-

cupy said premises during the period from this date to January 1, 1990." It further provided that if any of said property "shall be conveyed or leased in violation of this agreement" the right, title or interest of the owner so violating the agreement "shall be forfeited to and rest in such of the then owners of all of said lots and parcels of land not included in such conveyance or lease who may assert title thereto by filing for record notice of their claim * * *."

The agreement also provided for an action to recover damages against any person or persons who violated the restriction, "or such owners may jointly or severally enforce or have their rights hereunder enforced by an action for specific performance, abatement, ejectment, or by injunction or any other proper judicial proceedings, which right shall be in addition to any and all right to the interest so conveyed or leased in violation of this agreement."

[*Enforcement Provisions*]

It is contended by counsel for defendants that the Supreme Court of the United States in Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, McGhee v. Sipes, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 and Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, did not have before it an agreement "for automatic forfeiture, nor did any of them create a future interest in the land." Counsel assert that they have no quarrel with these decisions stating that the Supreme Court "has been concerned solely with the question of judicial enforcement of restrictive covenants by injunction or by damages."

Covenants such as the one here considered whether denominated "executory interests" or "future interests", as urged by counsel for defendants, cannot change the character of what was here attempted.

Counsel for defendants contend that the agreement in question entered into by the predecessors in interest of plaintiffs and defendants did not create a "private anti-racial restrictive covenant." Instead they claim that it created a future interest in the land known as an executory interest.

They assert "Such interest vested automatically in the defendants upon the happening of the events specified in the original instrument of grant, and the validity of the vesting did not in any way depend upon judicial action by the courts. The trial court's failure and refusal to recognize the vested interest of the defendants, and its ruling that the defendants have no title or interest in or to the property, deprived the defendants of their property without just compensation and without due process of law." We cannot agree.

[*Parties Represented*]

In the amended complaint numerous persons, firms and corporations were named as defendants, but in designating the record to be filed in this court only the amended complaint, the answer and counterclaim of the defendants Whitney J. Armelin, Carmelita Armelin and Capitol Federal Savings and Loan Association, together with plaintiff's reply thereto, the stipulation of facts together with the judgment and decree of the trial court, are specified. The record was amended on motion of Midland Federal Savings and Loan Association to include its answer in which the allegations of the amended complaint were admitted and said association prayed that plaintiffs be awarded the relief demanded in their amended complaint. We are not advised as to pleadings filed by the other defendants, including Robert E. Lee, Public Trustee and the City and County of Denver, who with the Midland Federal Savings and Loan Association are named as defendants in error in the instant case.

We are unable to rid ourselves of a strong impression that this writ of error is being prosecuted in the interest of title examiners, rather than in that of the property owners in Block 6 Ashley's addition to Denver. In the brief of counsel for plaintiffs in error we find this significant language: "Title examiners are in constant apprehension as to whether a title may be passed where these restrictive covenants prevail, and we feel that we should call upon this Honorable Body as to the doubts of this decision."

[*Contract Unenforceable*]

No matter by what ariose terms the covenant under consideration may be classified by astute counsel, it is still a racial restriction in violation of the Fourteenth Amendment to the Federal Constitution. That this is so has been definitely settled by the decisions of the Supreme Court of the United States. High sounding phrases or outmoded common law terms cannot alter the effect of the agreement embraced in the instant case. While the hands may seem to be the

hands of Esau to a blind Isaac, the voice is definitely Jacob's. We cannot give our judicial approval or blessing to a contract such as is here involved.

In Shelley v. Kraemer, supra [334 U.S. 1, 68 S.Ct. 845], the Supreme Court of the United States said:

> "We hold that in granting judicial enforcement of the restrictive agreement in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. The Fourteenth Amendment declares 'that all persons, whether colored, or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that *no discrimination shall be made against them by law because of their color.*'" (Emphasis supplied.)

Because the language of the United States Supreme Court suggested that private racially restrictive covenants were not invalid per se, it was believed for some time that an action for damages might lie against one who violated such a covenant. A number of state courts adopted this position, and awarded damages against those who, contrary to their agreements, had made sales of property to negroes or other persons within the excluded classes. This problem came to the attention of the Supreme Court of the United States in Barrows v. Jackson, 346 U.S. 249, 253-254, 258, 259, 73 S.Ct. 1031, 97 L.Ed. 1586, where it was held that although such a grantor's constitutional rights were not violated, nevertheless the commodious protection of the Fourteenth Amendment extended to her and she could not be made to respond in damages for treating her restrictive covenant as a nullity.

Because the United States Supreme Court has extracted any teeth which such a covenant was supposed to have, no rights, duties or obligations can be based thereon.

The judgment is affirmed.

FRANTZ, J., not participating.

INDIANS
Tribal Liability—Federal Statutes

Henry Thomas HAILE, Jr., individually and as Administrator of the estate of Agnes Lewis Haile, deceased, et al. v. Osley Bird SAUNOOKE, Bertha Saunooke, The Eastern Band of Cherokee Indians, a Corporation, and the United States, in its capacity as a government and also as trustee for and guardian of The Eastern Band of Cherokee Indians and the individual members thereof.

United States Court of Appeals, Fourth Circuit, July 13, 1957, 246 F.2d 293.

SUMMARY: Persons injured through the collapse of a swinging bridge on the Cherokee Indian Reservation in North Carolina brought an action in federal district court against the individual Indians operating a tourist attraction which was reached by the bridge, the Eastern Band of Cherokee Indians and the United States both in its capacity as a government and as trustee and guardian of the Cherokee Band. The Court of Appeals for the Fourth Circuit, in affirming the dismissal of the case as to the Eastern Band of Cherokees and the United States in its capacity as trustee or guardian, includes a general discussion of the status of Indian tribes and their individual members.

Before PARKER, Chief Judge, and SOBELOFF and HAYNSWORTH, Circuit Judges.

PARKER, Chief Judge.

This is an action to recover damages for personal injuries sustained from the collapse of a swinging bridge over the Oconaluftee River on the Cherokee Indian Reservation in Swain County, North Carolina. The plaintiffs are citizens of Tennessee who were on a visit to the reservation and who were crossing the bridge to reach a tourist attraction operated by Osley Bird Saunooke and his wife, members of the Eastern Band of Cherokee Indians. Saunooke and wife were named as defendants in the action along with the Eastern Band of Cherokee Indians and the United States "in its capacity as a government and also as trustee for and guardian of the Eastern Band of Cherokee Indians and the individual members thereof." The District Judge dismissed the action against the Eastern Band of Cherokee Indians and against the United States as trustee for and guardian of the band and the individual members thereof, but retained the action against the individual defendants and against the United States, other than as trustee and guardian, and allowed the United States additional time within which to plead to the complaint. He signed an order under Rule 54 (b), Fed.Rules Civ.Proc. 28 U.S.C.A. severing from the action for purposes of appeal the cause of action as to which dismissal was entered, so as to allow immediate appeal from the order of dismissal and the plaintiffs have appealed therefrom.

[*Federal Tort Claims Act*]

It is to be noted that the action was not dismissed as to the individual defendants nor as to the United States, which might be liable under the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671 et seq., upon a proper showing of negligence on the part of its employees in the construction or maintenance of the bridge; but the dismissal extended only to the cause of action asserted against the Eastern Band of Cherokee Indians and against the United States as trustee or guardian for them. As recovery is sought against the United States under the Federal Tort Claims Act for negligence of its employees in connection with the bridge, it is clear that the suit against it in its capacity as trustee for or guardian of the Indians could only be for the purpose of notifying it to defend the suit for them pursuant to Rule 17(c) of the Rules of Civil Procedure, or for the purpose of rendering any judgment which might be entered in the cause binding with respect to the property of the Indians which the government held for them as trustee or guardian.

[*Status of Eastern Band*]

It is well settled that the Eastern Band of Cherokee Indians is an Indian Tribe within the meaning of the Constitution and laws of the United States. In United States v. Wright, 4 Cir., 53 F.2d 300, 303 we went carefully into the history of this remnant of the Cherokees of North Carolina and showed how they had acquired the lands upon which they were living and had reacquired their status as an Indian Tribe under the protection of the Government of the United States. We made reference to their recognition as a tribe by Congress in the Act of July 27, 1868, saying:

> "By the purchases of Thomas, therefore, this Eastern Band of Cherokees had acquired the right to the possession of a large boundary of land in North Carolina, and by the North Carolina statute of 1866 they had acquired, with the approval of the government of the United States, permission to remain permanently in that state. Their economic status had thus been practically restored to what it was prior to the Treaty of New Echota; and Congress in the act of July 27, 1868, 15 Stat. 228, recognized this status by providing that the Secretary of the Interior should cause a new roll or census to be made 'of the North Carolina or Eastern Cherokee,' and that thereafter the Secretary of the Interior should 'cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees *as of other tribes of Indians*.' (Italics ours.)"

[*Guardianship by U. S.*]

We pointed out how the lands of these Indians had been conveyed by the Commissioner of Indian Affairs to the corporation created by the Legislature of North Carolina under a decree which provided that nothing therein should "be construed as interfering with the right of the Commissioner of Indian Affairs from exercising such supervisory charge over the person and

property of said band of Indians and the members thereof and the contracts of said Indians as that officer now has by virtue of the Constitution of the United States and the treaties and laws in pursuance thereof." We pointed out also that the deed of the Commissioner of Indian Affairs contained the same proviso and that the title remained in the corporation until conveyed to the United States on July 21, 1925 pursuant to the provisions of the Act of June 4, 1924, 25 U.S.C.A. § 331 note. With respect to the guardianship exercised over this band of Indians by the United States, we said:

"Not only with respect to the acquisition and preservation of the title to this land, but also in practically every other way imaginable, the government of the United States from 1868 to the present day has continuously guarded and protected the interests of this band of Indians, and has done everything possible to promote their progress and development. It has supervised their contracts and instituted suits for the cancellation of contracts which were thought not advantageous to them. United States v. Boyd, C.C., 68 F. 577; Id., 4 Cir., 83 F. 547. It has appointed agents to guide them in the management of their affairs. It has built schools, including a large boarding school, and provided teachers for the education of their children. It has provided an experienced farmer to go among them and teach them the arts of agriculture. It has provided a hospital for the care of their sick, and has made provision for the care of their deaf, dumb, blind, and insane. It has provided a physician and a field nurse to go among them and care for the sick in their homes. It has furnished food and clothes for their school children, and has made allowances to members of the tribe to aid in their support. In other words, it has for more than sixty years treated them in all respects as wards of the nation, and has expended in recent years more than $100,000 annually for their support. It appears that for the fiscal year 1930 the appropriation for this purpose was approximately $135,000.

"* * * the life of this band of Indians, from an economic standpoint, both in its relation to the federal government and to the state, has been for more than sixty years practically that of other Indian tribes. Politically they have been subject to the laws of the state, but economically they have been wards of the federal government and cared for as such under the provisions of its laws."

[*Connections With Main Tribe*]

The court expressly answered the argument, now made again, that the Eastern Band of Cherokee Indians had lost their status as an Indian Tribe by reason of their separation from the main body of the Cherokees that had gone to the Indian Territory, saying:

"The fact that the Eastern Band of Cherokee Indians had surrendered the right to their tribal lands, had separated themselves from their tribe, and had become subject to the laws of the state of North Carolina, did not destroy the right or the duty of guardianship on the part of the federal government. The fact that they constituted a community of these aboriginal people who were wards of the government was sufficient basis for the exercise of the power; and to what extent the power should be exercised was for Congress to decide. Even the conferring of citizenship upon the Indians and allotment of lands to them in severalty does not place them beyond the reach of congressional regulations adopted for their protection. United States v. Sandoval, supra [231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107]; Tiger v. Western Inv. Co., 221 U.S. 286, 31 S.Ct. 578, 55 L.Ed. 738; Heckman v. United States, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820; United States v. Nice, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192; Brader v. James, 246 U.S. 88, 96, 38 S.Ct. 285, 62 L.Ed. 591. And the principle is well settled that whether the protective and regulatory power of Congress shall be extended over an Indian community is a political question with the determination of which the courts have no power to interfere. United States v. Holliday, 3 Wall. 407, 419, 18 L.Ed. 182; Tiger v. Western Inv. Co., supra; United States v. Sandoval, supra; Sisseton & Wahpeton Bands of Sioux Indians v. United States, supra [277 U.S. 424, 48 S.Ct. 536, 72 L.Ed. 939]. * * *

"In this case there can be no question but that the Eastern Band of Cherokee In-

dians is a distinctly Indian community. Congress for more than half a century has recognized it as such, and has extended to it the guardianship and protection of the government. In the opinion of Assistant Attorney General Campbell in 1904 approved by Secretary Hitchcock (copied in the record at pages 117-141) is contained a summary of the acts of Congress passed up to that time for the care and protection of the band, and the Assistant Attorney General thus summarizes his conclusions with regard thereto: 'From the foregoing necessarily prolix recitals it is manifest that the government has all along exercised a supervisory control over this band of Indians both in matters growing out of the treaties with the Cherokee Nation proper and the relations of the band itself involving the approval and disapproval of deeds and contracts with respect to the acquisition and sale of their lands and the disposal of the timber thereon. Since 1868, under specific legislation, the same supervisory charge has been taken of the Eastern Band of Cherokee Indians of North Carolina as of other tribes of Indians. There is nothing in recent legislation nor in the decrees of the courts to warrant the adoption of a different course or policy in regard to them. On the contrary the courts fully recognize such authority and decline to interfere with its exercise, thus conceding that it exists nowhere else.'"

[*Indian Contracts*]

In United States v. Boyd, 4 Cir., 83 F. 547, 555, this court dealt with a suit instituted by the United States to declare void a timber contract entered into by the band. In holding that even in the absence of fraud a contract not approved by the Department of the Interior would not be enforced, Judge Goff, after reciting various acts of Congress showing that the government was exercising the right of guardianship over the affairs of the band, said:

> "This shows that the original condition of the Indians in this country—that of pupilage under the government—has not been released, so far as this Eastern Band of Cherokees is concerned. It thus appears that the political departments of the government have recognized these Indians as constituting a tribe,—at least, within the meaning of that word as it is used in the constitution of the United States; and it is a rule of the courts, in matters of this kind, to follow the action of the executive and the departments whose duty it is to determine such affairs."

For other decisions of this court holding the Eastern Band of Cherokee Indians to be an Indian tribe within the meaning of the Constitution and Laws of the United States, see United States v. Colvard, 4 Cir., 89 F.2d 312; United States v. 7,405.3 Acres of Land in Macon, Clay, and Swain Counties, North Carolina, 4 Cir., 97 F.2d 417; Blair v. McAlhaney, 4 Cir., 123 F.2d 142; United States v. Parton, 4 Cir., 132 F.2d 886.

[*Tribe Not Subject to Suit*]

The rule that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument. Thebo v. Choctaw Tribe of Indians, 8 Cir., 66 F. 372; Adams v. Murphy, 8 Cir., 165 F. 304, 308; Turner v. United States, 248 U.S. 354, 358, 39 S.Ct. 109, 63 L.Ed. 291; United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 60 S.Ct. 653, 656, 84 L.Ed. 894. In the case last cited the Supreme Court said:

> "The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."

In Rollins v. Eastern Band of Cherokee Indians, 87 N.C. 229, the Supreme Court of North Carolina rendered a decision to the same effect, refusing to entertain a suit against this very band of Indians on the ground that they were under the guardianship of the federal government. The court said of the Act of Congress of July 15, 1870 (16 Stat. 362, sec. 11), that, if it did not confer, it recognized a corporate capacity in them as a collective body or tribe. It said further: "The remnant band of Cherokees remaining in the state, by distinct legislative ac-

tion, have been placed upon the same footing with other Indian tribes, under the protection and care of the government, and these statutory provisions [i.e. those for the protection of Indians] apply with equal pertinency and force to them as to that portion of the tribe who have emigrated, and been located in their western home. * * * It is obvious that the Indian tribes are in a state of pupilage to the general government, and the safe-guards of law are placed over them to secure them and their property from the artful practices of designing men, the dictate of an enlightened sense of national duty to the weak and defenseless of a race rapidly diminishing in numbers, and deemed incapable of self-protection."

[*Authority of Congress*]

The arguments offered in support of the right to sue this band of Indians, either directly or through the United States as trustee and guardian, merit but brief answer. It is said that the right to sue the band is given by the act of the Legislature of North Carolina incorporating the band; but it is perfectly clear that an act of a state legislature cannot be allowed to interfere with the guardianship over these people which the United States has assumed, since Congress alone must determine the extent to which the immunities and protection afforded by tribal status are to be withdrawn. See Tiger v. Western Investment Co., 221 U.S. 286, 31 S.Ct. 578, 55 L.Ed. 738; United States v. Nice, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192; Brader v. James, 246 U.S. 88, 38 S.Ct. 285, 62 L.Ed. 591; United States v. McGowan, 302 U.S. 535, 538, 58 S.Ct. 286, 82 L.Ed. 410; Board of Commissioners, etc. v. Seber, 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094.

[*U. S. as Trustee*]

In the absence of consent by Congress that these wards of the government be sued, it is not permissible to accomplish the same result indirectly by suing the United States as trustee or guardian for them. Turner v. United States, supra, 248 U.S. 354, 359, 39 S.Ct. 109, 63 L.Ed. 291. There is nothing in the federal Tort Claims Act which authorizes any such suit. That act authorizes suit against the government for damages caused by an employee of the government acting within the scope of his office or employment, not a suit against wards of the government nor against the government as their guardian for damages resulting from their acts, and the position of plaintiffs is not helped by reference to the Uniform Trusts Act. G.S. of North Carolina, § 36-37. Aside from the fact that the Uniform Trusts Act does not purport to render the trustee liable for the torts of the cestui que trust, it is clear, as pointed out above, that only Congress can determine the extent to which the immunities and protection afforded by tribal status are to be withdrawn.

The suit against the Eastern Band of Cherokee Indians and against the government in its capacity as guardian or trustee was properly dismissed; but, as heretofore stated, this will not preclude plaintiffs from proceeding against the individual defendants, nor against the government itself, if they can show damages resulting from any negligent or wrongful act or omission of any employee of the government acting within the scope of his office or employment.

Plaintiffs contend that they are entitled to judgment by default against the United States in its sovereign capacity; but that question is not before us on the appeal from the order of dismissal and is without merit in any event, as the trial judge was acting well within his discretion in extending the time of the United States to file answer until after the questions raised by this appeal should be decided.

Affirmed.

INDIANS
Jurisdiction—North Dakota

William VERMILLION v. Alex SPOTTED ELK and Benny Dogskin

Supreme Court of North Dakota, October 14, 1957, 85 N.W.2d 432.

SUMMARY: An action for personal injuries was brought in a North Dakota state court between Indians who were residents of an Indian reservation. The accident out of which the

action arose occurred on a highway within the reservation. The trial court certified to the Supreme Court of North Dakota the question whether it had jurisdiction to determine the suit in view of the provisions of the enabling act, by which the state was admitted to the union, concerning the jurisdiction of the United States over Indians and Indian lands. The court held, on the basis of later federal statutes and the constitution of North Dakota, that Indians may sue and be sued in state courts when the subject matter involved is not Indian lands.

[*Syllabus by the Court*]

1. Where plaintiff, an enrolled Indian who is a citizen of the United States, brought a civil action growing out of tort, in a district court of the state, against another Indian, plaintiff was entitled to bring such action and the state court had jurisdiction to try such action under the provisions of Section 22 of the State Constitution notwithstanding both parties to the action were residents of Standing Rock Indian Reservation where the cause of action arose.

2. The compact between the United States and the State of North Dakota created by Section 4 of the Enabling Act and disclaimer in Section 203 of the State Constitution is not a reservation by the United States of exclusive jurisdiction of civil causes of action not involving lands, between Indians residing on reservations within the boundaries of the State.

3. The Act of Congress of August 15, 1953 giving consent of the United States to civil and criminal jurisdiction to any state not having such jurisdiction has no application to states which had assumed and had exercised such jurisdiction prior to the enactment thereof without intervention by the United States.

[*Opinion*]

SATHRE, Justice.

This case comes to this court for determination of a certified question of law from the district court of Burleigh County, pursuant to provisions of Chapter 32–24, NDRC 1943. The complaint alleges that defendents negligently and carelessly operated their automobile on State Highway number 21 within the Standing Rock Indian Reservation, and through their negligence and carelessness collided with the plaintiff's automobile causing personal injuries to plaintiff and damaging his said automobile.

The defendants in their answer admitted that there was a collision as alleged by the plaintiff but as a defense alleged that the district court had no jurisdiction to hear and determine a civil cause of action arising out of tort for the reason that the parties to the action were enrolled Indians, residing within the boundaries of the Standing Rock Indian Reservation in the State of North Dakota.

There is no dispute as to the facts in this case. The plaintiff and the two defendants are enrolled Indians residing on the Standing Rock Indian Reservation. The collision out of which said action arose occurred on State Highway No. 21 in Sioux County, North Dakota, within the said Indian Reservation.

[*Question Certified*]

The case came on for trial in the District Court of Burleigh County before the Hon. C. L. Foster, one of the judges of said district court. Under the pleadings the sole question presented for determination was a question of law, that is, whether or not the district court had jurisdiction to determine a civil cause of action arising in tort between enrolled Indians residing within the boundaries of an Indian Reservation where the cause of action arose within said reservation. The district court answered the said question in the affirmative and held that the district courts of the state have jurisdiction in such case. It held, however, that the proper answer to said question was in doubt; that it was of vital importance and that the proper determination thereof will depend wholly on the construction of the law applicable thereto and that the said question is of great moment and of public importance.

The Attorney General of the State appeared for the defendants under the provisions of the unsatisfied judgment fund law of the State and contended that the district court was in error in holding that it had jurisdiction to try the case. The trial court thereupon certified the question to this court which question is as follows:

> "Does the district court of the State of North Dakota have jurisdiction to hear and determine a civil cause of action arising in

tort between enrolled Indians where the cause of action is for personal injuries arising out of an automobile accident on State Highway No. 21, in Sioux County, North Dakota, about 7 miles east of the Village of Solen the scene of said accident being located within the boundaries of the Standing Rock Indian Reservation."

[*Enabling Act*]

The Attorney General cites the provisions of Section 4 of the Enabling Act under which North Dakota was admitted into the Union and Section 203 of the Constitution. The portion of the Enabling Act cited reads as follows:

"That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States;"

[*North Dakota Constitution*]

Article XVI of the Constitution, Compact with the United States, is as follows:

"The following article shall be irrevocable without the consent of the United States and the people of this state:

"Section 203. First. * * *

"Second. The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian Tribes, and that until the title thereto shall have been extinguished by the United States, and the same shall be and remain subject to the disposition of the United States, and that said Indian Lands shall remain under the absolute jurisdiction and control of the congress of the United States;"

The attorney general asserts that under the provisions of the Enabling Act and Section 203 of the Constitution quoted above the United States had jurisdiction not only over the Indian lands but also over civil causes of action between the enrolled Indians residing thereon; that such jurisdiction continues in effect until the United States has relinquished its jurisdiction and the people of the State have accepted jurisdiction by appropriate legislative action. In support of this contention is cited the Act of Congress of the United States enacted August 15, 1953. Public Law No. 280, Chapter 505, United States Statute at Large Volume 67, pages 589, 590. Sections 4, 6, and 7 of said Act are as follows:

[*Act of August 15, 1953*]

"Sec. 4, Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except Menominee Reservation. * * *

"Sec. 5. * * *

"Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction

in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

"Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State of assumption thereof. Approved August 15, 1953."

[*Consent by North Dakota*]

It is argued that while under Sections 6 and 7 of the Federal Statute quoted the United States gave its consent to any State to assume civil and criminal jurisdiction over enrolled Indians residing within Indian Reservations, the State of North Dakota has not such jurisdiction since the people of the State have not consented thereto by appropriate legislative enactment.

The attorney general cites also State v. Kuntz, N.D., 66 N.W.2d 531 and State v. Lohnes, N.D., 69 N.W.2d 508. However, these cases involved crimes committed on Indian reservations by or against Indians. The defendants in both cases were convicted in the state district courts. They appealed challenging the jurisdiction of the state courts on the ground that the crimes were committed against Indians who were residents on Indian reservations. We held in both cases that the district courts were without jurisdiction. In the Lohnes case reference was had to the Act of Congress of May 31, 1946, 60 U. S. Statutes at Large, page 229 which confers concurrent jurisdiction on the State of North Dakota over offenses committed by or against Indians on the Devils Lake Indian Reservation. In that case this court held that notwithstanding the Act of Congress of May 1946 the state courts did not have jurisdiction because the people of the state had not consented by appropriate legislative enactment to assume jurisdiction as required by the Enabling Act and the State Constitution. By the Act of Congress of August, 1953 the United States gave its consent to any state not having jurisdiction in civil causes of action to exercise such jurisdiction. The Act can have no application in states where the courts have exercised such jurisdiction under their constitutions and laws without adverse appearance by the United States. We do not believe that the Enabling Act and the disclaimer in Section 203 of the State Constitution can be held to have reserved to the United States jurisdiction in civil actions between Indians on Indian reservations within the State not involving Indian lands.

[*Citizenship*]

The Attorney General argues that since under the decisions in the Kuntz and Lohnes cases, supra, it is settled law that the courts of this state do not have jurisdiction in criminal cases involving Indians on Indian Reservation, it necessarily follows that the state courts are without jurisdiction in civil cases, until the people of the state have consented thereto by appropriate legislation. We do not believe that the decisions in the Kuntz and Lohnes cases, supra, warrant such a broad application. The enrolled Indians on the Standing Rock Reservation are citizens of the United States and residents of the State of North Dakota. In 27 Am. Jur. Indians, Sec. 21, page 554, it is stated:

"Since the grant of United States citizenship to Indians born within the territorial limits of the United States, it would seem that Indians, as citizens, have the right to prosecute and defend actions in any proper court, either Federal or State. In fact their right to maintain actions in Federal Courts is not only a resonable, but almost a necessary, inference to be derived from early Federal cases, holding that Indians who are not citizens of the United States cannot maintain actions in Federal Courts and from other such cases permitting Indians, in many instances, so to do, no reference being made as to the question of citizenship.

"It has, furthermore, been almost uniformly held that Indians may sue or be sued in state courts, since the latter are generally open to all persons irrespective of race, color, or citizenship, and the fact that their lands are not liable to levy and sale under a judgment is not grounds for refusing a judgment against them. In bringing a suit in a state court, an Indian is subject to the same laws relating to the prosecution of suits which

govern any citizen of the state, including the statute of limitations.

"It has been held that an Indian may assign his right of action to a white man."

And in 42 C.J.S. Indians § 8, page 653:

"As a general rule, sometimes by reason of express statute, an Indian may sue in a state or territorial court the same as all other persons, irrespective of race or color, at least with respect to any matter over which congress has not expressly retained jurisdiction in the United States, particularly if the Indian is a citizen. If the right of an Indian to sue in a state court is conferred by statute, an action brought thereunder must satisfy its terms and conditions."

In the case of Holden v. Lynn, 30 Okl. 663, 120 P. 246, 38 L.R.A.,N.S., 239 it was held that the state courts have jurisdiction in an action by an Indian ward of the government to recover the reasonable value of the use of lands as mesne profits against one holding a lease on allotted land which was void for want of approval by the superintendent of the Indian agency or the proper United States Official.

In the case of Smith v. Northern Pac. Ry. Co., 57 Mont. 14, 186 P. 684, 686, the Supreme Court of Montana said:

"It has been repeatedly held that by virtue of the act of February 8, 1887, supra, (24 Statute at Large, 390, 25 U.S.C.A. § 349) Indians who have severed their tribal relations and taken allotments are citizens and entitled to institute or defend actions of ejectment or trespass in state or federal courts, regardless of prohibition against the alienation of the lands obtained under their allotment."

In the case of Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145, 153, the Supreme Court of New Mexico held that a New Mexico probate court had jurisdiction to appoint an administrator for a deceased reservation Indian to enforce the right of action under the Wrongful Death Statute of the state. We quote from the opinion.

"And in the case at bar we are unable to discover in the acts of Congress which have for their object the regulation of Indians' affairs and exercising a control of Indian reservations and the property granted by Congress to Indians anything which militates against the power of the state to confer a right upon an Indian arising from our Death by Wrongful Act Statute."

[*Montana Case*]

In a recent Montana Case, Bonnet v. Seekins, 126 Mont. 247, 243 P.2d 317 the plaintiff an Indian of the Blackfeet Tribe, brought an action in district court to recover $1,500 from the defendant as rental alleged to be due under the terms of a written lease, and the additional sum of $1,965 as damages alleged to have been sustained because of damage to the property covered by the lease. Defendant admitted the execution of the lease, but contended that the state court was without jurisdiction since the land involved in the lease was trust patented land. The Supreme Court of Montana held that the state court had jurisdiction. Montana and North Dakota were admitted into the Union under the same Enabling Act, and the Constitution of Montana, Ordinance No. 1, § 2, has the identical disclaimer contained in Section 203 of the Constitution of North Dakota.

The disclaimer in Section 203 of the Constitution was a condition imposed upon the State by the Enabling Act for the purpose of safeguarding the interests of the Indian in their allotments of lands within the reservations. In reserving jurisdiction and control of such lands, we do not believe it was the intent of Congress to reserve jurisdiction over civil rights of Indians which do not grow out of or have any relation to Indian lands.

[*Oklahoma Case*]

In the case of Mars v. McDougal, 10 Cir., 40 F.2d 247, 249, the facts show that Lusanna Brink, a full-blood Creek Indian, by her guardian, brought action in the district court of Creek County, Oklahoma, against the defendants to set aside certain deeds she had executed to them, alleging mental incapacity, inadequacy of consideration and fraud. The district court rendered judgment in favor of the plaintiff. Thereafter the United States as guardian for Lusanna Brink and others brought action in United States District Court, Eastern District of Oklahoma against the grantees of Lusanna Brink to set aside the deeds executed to them. At the trial, upon the motion of the United States, the action was dismissed with prejudice. An appeal was taken to the

Circuit Court of Appeals, Tenth Circuit. The Circuit Court affirmed the decision of the District Court and held that the decision of the state court was binding upon the Indians. We quote from the opinion:

> "The Oklahoma court had jurisdiction of the parties and of the subject matter and, having jurisdiction, its decree whether right or wrong, is valid and binding and is res adjudicata until set aside by proper proceedings. Swift v. Jackson, 10 Cir., 37 F. 237; Gordon v. Ware Nat. Bank, 8 Cir., 132 F. 444, 449, 67 L.R.A. 550. The fact that Lusanna Brink was a full blood Creek Indian does not alter the situation. Under section 6, art. 2, of the Constitution of Oklahoma, Lusanna Brink was authorized to sue in the district court of Creek County to establish her interest in such allotment. When she availed herself of that privilege and submitted herself and her cause to the jurisdiction of that court, she became bound by the decree entered therein the same as any other person."

Section 6 of Article II of the Constitution of State of Oklahoma reads as follows:

> "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

Sec. 22, Article I, Constitution of North Dakota is of similar import and is as follows:

> "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct."

Sec. 6, Article III of the Constitution of Montana likewise provides that:

> "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial, or delay.

The Enabling Acts and the Constitutions of the States of Montana, Oklahoma and New Mexico have the identical provisions contained in Section 4 of the Enabling Act for North Dakota and in Section 203 of the Constitution.

Notwithstanding the provisions in the Enabling Acts and disclaimers in the Constitutions of said states, their courts assumed and exercised jurisdiction in civil cases between enrolled Indians residing on reservations within the boundaries of said states, without intervention by the United States.

The case at bar grew out of tort, committed on an Indian reservation and was brought by an Indian against Indians.

[*No Reservation of Jurisdiction*]

They are citizens of the United States and residents of the State of North Dakota. Under Section 22 of the Constitution the courts of the State are open to them. The compact between the United States and the State of North Dakota created by the Enabling Act and the disclaimer in Section 203 of the Constitution have reference to Indian lands. The provisions of the compact cannot be held to be a reservation by the United States of jurisdiction in civil cases not involving lands, between Indians residing on Indian reservations.

The district court having answered the certified question in the affirmative we conclude that the answer was correct.

GRIMSON, C. J., and MORRIS, BURKE and JOHNSON, JJ., concur.

CENSORSHIP
Motion Pictures—Georgia

Richard BELL, Solicitor General, Stone Mountain Judicial Circuit v. GEORGIA THEATRE COMPANY, d/b/a Twin Starlight Drive-In Theatre, et al.

DeKalb County Superior Court, Georgia, October 21, 1957, No. 22,610.

SUMMARY: A petition was filed in a Georgia state court by a circuit solicitor to require a motion picture exhibitor to show cause why it should not be enjoined from exhibiting the film "Island in the Sun." The film in question contains episodes of bi-racial social contact in the West Indies. The court issued a temporary restraining order pending a hearing on the petition.

GUESS, J.

ORDER

The within and foregoing petition read and considered, the same is ordered filed.

Let the defendants be served with a copy of said petition and this order and be and appear before this court on the 7 day of November, 1957, at 10 A.M. o'clock, then and there to show cause, if any they have, why said prayers should not be granted.

In the meantime, and until further order of this court, the defendants, their agents and servants are instanter restrained and enjoined from showing or exhibiting, for or without consideration, the film known as "Island in the Sun".

This the 21st day of October, 1957.

MALICIOUS PROSECUTION
Defamation—Louisiana

William P. COX v. Dr. Paul CASHIO

Court of Appeals of Louisiana, First Circuit, June 28, 1957, 96 So.2d 872.

SUMMARY: An action for false arrest and malicious prosecution was brought in a Louisiana State court against a doctor. In defense of the suit it was shown that the arrest and prosecution of the plaintiff had been commenced because the plaintiff had made the false statement or inference that the defendant was of Negro extraction and slandered him by stating that he would not have the defendant "treat his dog." The defendant also set up a counterclaim. The defendant appealed from a decision of the trial court denying him damages on the counterclaim. The Court of Appeal, First Circuit, held that the statements of the original plaintiff constituted good cause for the arrest and prosecution and that the original defendant was entitled to $500 damages on the counterclaim. Part of the court's opinion, by TATE, J., follows:

* * *

Plaintiff filed suit seeking damages for an alleged false arrest and malicious prosecution; defendant reconvened. Defendant appeals from the District Court's refusal to award him damages upon his reconventional demand due to his alleged failure to prove same with legal certainty; plaintiff-appellee answered the appeal praying that the District Court's dismissal of his original demand be reversed and for judgment in his favor.

On December 1, 1953, the appellant (defendant and also the plaintiff in reconvention) swore out an affidavit before the local Justice of the Peace in Lacombe that Cox, the plaintiff-appellee, was "making false statements tending to derogate from honor and character of the undersigned; causing false rumors to be spread:

asks that Cox be placed under peace bond." The appellant is a physician who has just constructed a 19-bed hospital and just moved to Lacombe to conduct his medical practice.

Both the Justice and the appellant testified that the latter did not desire the arrest of appellee, but just to have him cease making certain false and derogatory statements concerning the appellant and his family and his medical ability. Although the justice of the peace intended to require Cox to post a peace bond under LSA-R.S. 15:27, he did not have Cox brought before him before requiring same, In re Bordelon, 210 La. 1080, 29 So.2d 162. Instead, he issued a warrant against plaintiff Cox on a charge of his "making false statements tending to derogate from honor and character of" the appellant physician, i.e., for the crime of defamation, LSA-R.S. 14:47.

The ward constable informed Cox he would have to make a bond of $250, went with him to a friend, who signed said bond with the ward constable.

In an action to recover damages for malicious prosecution of a criminal or civil proceeding, the plaintiff must prove: (1) termination of the proceeding in favor of the plaintiff; and (2) lack of probable cause, and (3) malice on the part of the defendant. Scott v. Citizens' Hardware & Furniture Co., 180 La. 473, 156 So. 469; Graham v. Interstate Electric Co., 170 La. 392, 127 So. 879; Kenner v. Milner, La.App. 1 Cir., 187 So. 309, rehearing denied 189 So. 460; 54 C.J.S. Malicious Prosecution § 1, p. 951.

We think the District Court correctly held that plaintiff failed to prove all three of these essential elements of this cause of action. It is sufficient to state that the record supports the trial court's finding that on several occasions the plaintiff publicly in crude language made the false statement or inference that the defendant-appellant was of Negro extraction, and that the said plaintiff-appellee slandered said physician by stating that he would not have the latter treat his dog. Defendant-appellant clearly had good cause to swear out his affidavit before the justice of the peace.

* * *

CONTRIBUTIONS
Records and Reports—Arkansas

See *Smith v. Faubus*, page 1103, supra.

EDUCATION
Public Schools—Florida

Chapter 1975 of the 1957 Acts of the Florida legislature, approved October 25, 1957, provides for the automatic closing and suspension of operation of any public school in the state at any time military forces are employed or used under federal authority at or in the vicinity of the school. Boards of public instruction are authorized to take action for closing and transferring pupils under the act.

CHAPTER 57-1975
HOUSE BILL NO. 111-X

AN ACT relating to the public schools of Florida; providing for the automatic closing and suspension of operation of any public school in the state upon the employ of Federal troops in the vicinity of said school for certain purposes; providing certain powers and duties of county boards of public instruction in connection with such closing of schools; and providing an effective date.

WHEREAS, the President of the United States of America has called upon the National Guard and the Army of the United States to prevent violence and unrest at a public school in the State of Arkansas, and

WHEREAS, such a course of action would not be to the best interests and welfare of the people of the State of Florida, if taken in this state, and

WHEREAS, it is the obligation of the individual state to furnish educational facilities within its boundaries and to control all activities in connection therewith, and

WHEREAS, if at any time the state does not or is unable to prohibit any violence or unrest on public school properties or in the vicinity of such schools and as a result thereof, any Federal authority deems it necessary and does use the National Guard or other military forces to prevent violence upon any public school property or in the vicinity thereof, as a matter of fact and policy, such school should be closed for the best interest of the children and the citizens of the community, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1.
In the event the National Guard or any other military forces or personnel are employed or used upon the order or direction of any federal authority on public school properties of this state or in the vicinity of any public school in this state to prevent acts of violence or alleged acts of violence precipitated or alleged to be precipitated by the operation of said school or student or students attending such school, said school shall be closed automatically and its operation suspended so long as said troops remain on such school properties or within the vicinity of said school.

Section 2.
The board of public instruction of any county wherein a school is closed pursuant to the provisions of section 1 hereof, is authorized and directed to take necessary steps to carry out the provisions of this said section.

Section 3.
The board of public instruction of any county in which a school is closed under the provisions of this act may authorize and provide for the transfer to another school in the county of any pupil enrolled in such closed school upon petition of the parent or the person standing in loco parentis to such child requesting such transfer.

Section 4.
For the purpose of the preparation of attendance records required by law, pupils enrolled in any school closed under the provisions of this act shall be considered and reported "present" during the period of suspension of operation.

Section 5.
This act shall take effect immediately upon becoming a law.

Approved by the Governor Oct. 25, 1957.
Filed in Office Secretary of State Oct. 25, 1957.

EDUCATION
Public Schools—Illinois

House Bill No. 254G of the 1957 session of the Illinois legislature, as enacted and approved on July 10, 1957, amends a prior statute concerning the basis for furnishing state aid to local schools. The new act requires a certificate in regard to non-segregation of pupils and non-discrimination in employment of school personnel as a prerequisite for obtaining state aid.

An Act to amend Section 18-14 of "The School Code", approved May 1, 1945, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 18-14 of "The School Code", approved May 1, 1945, as amended, is amended to read as follows:

Sec. 18-14. The school board of each school district shall require teachers, principals, or superintendents to furnish from records kept by them such data as it needs in preparing and certifying to the county superintendents not later than July 15th of each year prior to 1956 its school district report of claims provided in Sections 18-9 to 18-13, inclusive on blanks to be provided by the Superintendent of Public Instruction. In 1956 and later years said district claim shall be based on the latest available equalized assessed valuation and educational tax rate, shall use the average daily attendance for that part of the current school term prior to November 1 as determined by the method outlined in Section 18-9, and shall be certified and filed by November 7. Such report shall be accompanied by an affidavit, sworn to by either the superintendent, principal, administrative officer, or a member of the school board, stating that each school operated by such board has complied with the requirements of Sections 27-3, 27-4 and 27-22 in regard to patriotism, American history, and constitutional principles.

Failure on the part of the school board to prepare and certify the school district report of claims for State aid and the accompanying affidavit as required above to the county superintendent on or before August 15 prior to 1956 and by November 14 in 1956 and later years shall constitute a forfeiture by the district of its right to participate in a distribution of the common school fund for the succeeding year.

The county superintendent of schools shall prepare and certify to the Superintendent of Public Instruction not later than October 1 of each year prior to 1956 and not later than November 30 in 1956 and later years the county report of claims for State aid upon blanks prepared and furnished by the Superintendent of Public Instruction.

The Superintendent of Public Instruction shall prepare and certify to the Auditor of Public Accounts not later than December 1 of each year prior to 1956 and by January 25 in 1957 and later years the State report of claims for State aid setting forth the amount of money due each county from the common school fund, together with the amount claimed by each city or school district not coming under the provisions of the retirement system created by Sections 25-1 to 25-92, inclusive.

Amended claims based on attendance for the entire school year ended June 30 shall be certified and filed with the county superintendent by July 15 and failure to so file by July 22 shall constitute forfeiture of the right to file any such amendment of claims; the county superintendent of schools shall certify the county report of amended claims by August 5; and the Superintendent of Public Instruction shall certify the State report of amended claims to the Auditor of Public Accounts by September 15.

No State aid claim may be filed for any district unless the clerk or secretary of the school board executes and files with the Superintendent of Public Instruction, on forms prescribed by him, a sworn statement that the district has complied with the requirements of Section 6-37 in regard to the non-segregation of pupils on account of color, creed, race or nationality.

No State aid claim may be filed for any district unless the clerk or secretary of the

school board executes and files with the Superintendent of Public Instruction, on forms prescribed by him, a sworn statement that to the best of his knowledge or belief the employing personnel have not been discriminated in the employment of teachers on the basis of color, creed, race or nationality.

EDUCATION
Public Schools—Missouri

House Bill No. 163 of the 1957 General Assembly of Missouri, as enacted, repeals several prior sections of the Revised Statutes of Missouri and the 1955 Supplement thereto. The repealed sections (Sections 163.130, 165.177 and 165.297, RSMo 1949 and section 164.030, RSMo 1955 Supp.) required the establishment of separate schools for white and Negro pupils.

EDUCATION
Teachers—California

Chapter 1853 of the 1957 acts of the California legislature, approved July 6, 1957, provides for the appointment, within the state department of education, of a commission "to assist and advise local school districts in problems relating to racial, religious or other discrimination in connection with the employment of certificated employees."

AN ACT to add Section 187 to the Education Code, relating to the Department of Education. [Approved by Governor July 6, 1957. Filed with Secretary of State July 9, 1957.]

The people of the State of California do enact as follows:

Section 1. Section 187 is added to the Education Code, to read:

187. The State Board of Education may, upon recommendation of the Director of Education, establish in the Department of Education a commission to assist and advise local school districts in problems relating to racial, religious or other discrimination in connection with the employment of certificated employees.

PUBLIC ACCOMMODATIONS
Anti-Discrimination Act—Illinois

House Bill No. 284J of the 1957 session of the Illinois legislature, as enacted and approved on July 11, 1957, makes amendments to that state's "civil rights law." The earlier (1885) statute is amended so as to include public golf courses and public golf driving ranges within the class of public accommodations at which discrimination on account of race or other factors is prohibited. The penalty provisions of the prior statute are changed so as to add to

the provisions (for a criminal fine and civil forfeiture for the benefit of the person discriminated against) a section authorizing the treatment of such a place of public accommodation as a public nuisance which may be abated.

An Act to amend Sections 1 and 5 of "An Act to protect all citizens in their civil and legal rights and fixing a penalty for violation of the same", approved June 10, 1885, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Sections 1 and 5 of "An Act to protect all citizens in their civil and legal rights and fixing a penalty for violation of the same", approved June 10, 1885, as amended, are amended to read as follows:

Sec. 1. All persons within the jurisdiction of said State of Illinois shall be entitled to the full and equal enjoyment of the accommodation, advantages, facilities and privileges of inns, restaurants, eating houses, hotels, soda fountains, soft drink parlors, taverns, roadhouses, barber shops, department stores, clothing stores, hat stores, shoe stores, bathrooms, rest-rooms, theaters, skating rinks, public golf courses, public golf driving ranges, concerts, cafes, bicycle rinks, elevators, ice cream parlors or rooms, railroads, omnibuses, busses, stages, aeroplanes, streetcars, boats, funeral hearses and public conveyance on land, water or air, and all other places of public accommodations and amusement, subject only to the conditions and limitations established by laws and applicable alike to all citizens; nor shall there be any discrimination on account of race or color in the price to be charged and paid for lots or graves in any cemetery or place for burying the dead.

Sec. 5. Any inn, restaurant, eating house, hotel, soda fountain, soft drink parlor, tavern, roadhouse, barber shop, department stores, clothing stores, hat stores, shoe stores, bathroom, rest-room, theater, skating rink, public golf course, public golf driving range, concert, cafe, bicycle rink, elevator, ice cream parlor or room, railroad, bus, omnibus, stage, aeroplane, streetcar, boat, funeral hearse or any other public conveyances on land, water or air and all other places of public accommodation and amusement, wherein any of the provisions of section one of this Act are violated, is hereby declared to be a public nuisance, and may be abated as hereinafter provided. The owners, agents and occupants of any such place shall be deemed guilty of maintaining a public nuisance, and may be enjoined as hereinafter provided.

PUBLIC ACCOMMODATIONS
Anti-Discrimination Act—Illinois

The City of Chicago, Illinois, has enacted an ordinance prohibiting discrimination in places of public accommodation on grounds of race or color. The ordinance, as introduced, follows:

AN ORDINANCE

To Protect All Citizens in Their Civil and Legal Rights and Fixing the Penalty for Violation of the Same.

Be It Ordained by the City Council of the City of Chicago:

Section 1. All persons within the jurisdiction of said City of Chicago shall be entitled to the full and equal enjoyment of the accommodation, advantages, facilities and privileges of inns, restaurants, eating houses, soda fountains, soft drink parlors, taverns, roadhouses, barber shops, department stores, clothing stores, hat stores, shoe stores, bathrooms, restrooms, theaters, skating rinks, golf courses, golf driving ranges, concerts, cafes, bicycle rinks, elevators, ice cream parlors or rooms, railroads, omnibuses, buses, stages, aeroplanes, street cars, boats, funeral

hearses and public conveyances on land, water, or air, and all other places of public accommodations and amusement subject only to the conditions and limitations established by laws and applicable alike to all citizens; nor shall there be any discrimination on account of race or color in the price to be charged and paid for lots or graves in any cemetery or place for burying the dead.

Section 2. Any inn, restaurant, eating house, hotel soda fountain, soft drink parlor, tavern, roadhouse, barber shop, department store, skating rink, golf course, golf driving range, concert, cafe, bicycle rink, elevator, ice cream parlor or room, railroad, bus, omnibus, stage, aeroplane, street car, boat, funeral hearse or any other public conveyance on land, water or air and any other place of public accommodation and amusement, wherein any of the provisions of Section 1 of this ordinance are violated, is hereby declared to be a public nuisance. The owners, agents or operators of any such place shall be deemed guilty of maintaining a public nuisance.

Section 3. Any person violating any of the provisions of this chapter shall be fined not less than one hundred dollars nor more than two hundred dollars for each offense, and a separate and distinct offense shall be considered as having been committed for each and every day on which any person shall be guilty of any such violation.

RACIAL DISCRIMINATION
State Commission—Missouri

House Bill No. 125 of the 1957 session of the Missouri General Assembly creates a Commission on Human Rights. The commission is given the function of discouraging racial discrimination and is empowered to investigate complaints and recommend ways of eliminating injustice caused by such discrimination. The bill, as enacted, follows:

AN ACT to create a commission on Human Rights; providing for the appointment of the members thereof, the designation of the chairman thereof, and filling of any vacancies therein; providing that the members thereof shall serve without compensation; providing for the appointment of an executive director; and establishing the functions, powers, and duties of such commission, and for the termination thereof.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. As used in this act: "Discrimination" shall mean any unfair treatment based on race or national ancestry.

Section 2. There is hereby created a Commission on Human Rights. It shall consist of eleven members, one from each congressional district of this state, serving without compensation, to be appointed by the governor. One of the members shall be appointed chairman by the governor. Of the eleven members first appointed, three shall be appointed for one year, four for two years, and four for three years; thereafter, all appointments to the commission shall be for a term of three years. In the event of the death or resignation of any member, his successor shall be appointed to serve for the unexpired period of the term for which such member had been appointed.

Section 3. The function of the commission shall be to encourage fair treatment for and to foster mutual understanding and respect among, and to discourage discrimination against, any racial or ethnic group, or its members.

Section 4. The powers and duties of the commission shall be:

(1) To cooperate with other organizations, private and public to discourage discrimination.

(2) To conduct research projects or make studies into and publish reports on discrimination in Missouri.

(3) To receive and investigate complaints of discrimination and to recommend ways of eliminating any injustice occasioned thereby.

(4) To make an annual report to the governor and general assembly of its activities under this act.

(5) To employ an executive director and other necessary personnel within the limits of funds made available.

(6) To encourage fair treatment for all persons regardless of race or national ancestry.

Section 5. The powers and duties of the commission shall terminate on the thirtieth day of June, 1961.

EMPLOYMENT
Fair Employment Laws—Wisconsin

The Supreme Court of Wisconsin held in *Ross v. Ebert*, 82 N.W. 2d 315, 2 Race Rel. L. Rep. 648 (1957) that the Wisconsin "Fair Employment Code" did not provide for judicial enforcement of recommendations of the state Industrial Commission concerning racial discrimination by a union with respect to membership. The court further held that admittance to membership in a union is not an enforceable right in the absence of a statute. The 1957 session of the Wisconsin legislature enacted Chapter 266, 1957 laws, approved June 28, 1957, which provides individual equitable remedies and for enforcement procedures available to the Commission generally to be available in discrimination cases. Provision for judicial review under the state's "administrative procedure act" is also made.

An Act to create 111.36 (3) to (5) and 111.37 of the statutes, relating to discriminatory employment practices.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. 111.36 (3) to (5) of the statutes are created to read:

111.36 (3) If the commission finds probable cause to believe that any discrimination as defined in this subchapter has been or is being committed, it shall immediately endeavor to eliminate the practice by conference, conciliation or persuasion. In case of failure so to eliminate the discrimination, the commission shall issue and serve a written notice of hearing, specifying the nature of the discrimination which appears to have been committed, and requiring the person named, hereinafter called the "respondent" to answer the complaint at a hearing before the commission. The notice shall specify a time of hearing not less than 10 days after service of the complaint, and a place of hearing within either the county of the respondent's residence or the county in which the discrimination appears to have occurred. The testimony at the hearing shall be taken down by a reporter appointed by the commission. If, after hearing, the commission finds that the respondent has engaged in discrimination, the commission shall make written findings and recommend such action by the respondent as will effectuate the purpose of this subchapter and shall serve a certified copy of the findings and recommendations on the respondent together with an order requiring the respondent to comply with the recommendations, the order to have the same force as other orders of the commission and be enforced as provided in ch. 101. Any person aggrieved by noncompliance with the order shall be entitled to have the same enforced specifically by suit in equity. If the commission finds that the respondent has not engaged in discrimination as alleged in the complaint, it shall serve a certified copy of its findings on the complainant together with an order dismissing the complaint.

(4) It is unlawful for any organization or person referred to in s. 111.32 (1), (2) and (3) or for any employment agency which undertakes to procure employees or oppor-

tunities to work, to engage in any discrimination pursuant to this subchapter.

(5) If an order issued under sub. (3) is unenforceable against any labor organization in which membership is a privilege, the employer with whom such labor organization has an all-union shop agreement shall not be held accountable under this chapter, when such employer is not responsible for the discrimination.

Section 2. 111.37 of the statutes is created to read:

111.37 JUDICIAL REVIEW. Findings and orders of the commission under this subchapter shall be subject to review under ch. 227.

HOUSING
Publicly-Assisted Housing — Massachusetts

Chapter 426 of the 1957 acts of the Massachusetts legislature, approved June 7, 1957, makes it unlawful to discriminate on the basis of race, color or other factors in the renting or leasing of "publicly assisted housing accommodations." Such accommodations include, among others, housing which is tax exempt or which is built on land acquired by condemnation or on which a loan or mortgage is guaranteed or insured by the federal government.

AN ACT relative to discrimination because of race, color, religion, national origin or ancestry in publicly assisted housing accommodations.

Be it enacted, etc., as follows:

Section 1. Section 1 of chapter 151B of the General Laws is hereby amended by adding after subsection 8, added by section 2 of chapter 697 of the acts of 1950, the following three subsections:—

9. The term "housing accommodations" includes any building, structure or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings.

10. The term "publicly assisted housing accommodations" includes all housing accommodations in

(*a*) housing constructed after July first, nineteen hundred and fifty, and

(1) which is exempt in whole or in part from taxes levied by the commonwealth or any of its political subdivisions;

(2) which is constructed on land sold below cost by the commonwealth or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred and forty-nine;

(3) which is constructed in whole or in part on property acquired or assembled by the commonwealth or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction; or

(4) for the acquisition, construction, repair or maintenance of which the commonwealth or any of its political subdivisions or any agency thereof supplies funds or other financial assistance;

(*b*) housing which is located in a multiple dwelling, the acquisition, construction, rehabilitation, repair or maintenance of which is, after October first, nineteen hundred and fifty-seven, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof; provided, that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; and

(*c*) housing which is offered for sale, lease or rental by a person who owns or otherwise controls the sale of the same, and which is part of a parcel of ten or more housing accommodations located on land that is contiguous, exclusive of public streets, if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is after October first, nineteen hundred and fifty-seven, financed in

whole or in part by a loan whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof; provided, that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance; or (2) a commitment issued by a government agency after October first, nineteen hundred and fifty-seven, is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof.

11. The term "multiple dwelling" means a dwelling which is usually occupied for permanent residence purposes and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. A "multiple dwelling" shall not be deemed to include a hospital, convent, monastery, asylum or public institution, or a fireproof building used wholly for commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families. The term "family", as used herein, means (*a*) a person occupying a dwelling and maintaining a household either alone or with not more than four boarders, roomers or lodgers; or (*b*) two or more persons occupying a dwelling, either living together and maintaining a common household, or living together and maintaining a common household with not more than four boarders, roomers or lodgers. A "boarder", "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.

Section 2. Section 4 of said chapter 151B is hereby amended by striking out, in line 1, as appearing in section 4 of chapter 368 of the acts of 1946, the word "employment",—and by inserting after subsection 5, as so appearing, the following subsection:—

6. For the owner, lessee, sublessee, assignee or managing agent of publicly assisted housing accommodations or other person having the right of ownership or possession or right to rent or lease such accommodations:—

(*a*) to refuse to rent or lease or otherwise to deny to or withhold from any person or group of persons such accommodations because of the race, creed, color or national origin of such person or persons;

(*b*) to discriminate against any person because of his race, creed, color or national origin in the terms, conditions or privileges of such accommodations or in the furnishing of facilities or services in connection therewith; or

(*c*) to cause to be made any written or oral inquiry or record concerning the race, creed, color or national origin of a person seeking to rent or lease any such accommodation.

Section 3. Said section 4 of said chapter 151B is hereby further amended by adding at the end the following paragraph:—

Nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

Section 4. Section 5 of said chapter 151B, as amended by section 4 of chapter 479 of the acts of 1950, is hereby further amended by striking out, in lines 2, 10, 18, 31, 72, 78 and 89 and 90, the word "employment".

Section 5. Section 6 of said chapter 151B is hereby amended by striking out, in lines 7 and 10, as appearing in section 4 of chapter 368 of the acts of 1946, the word "employment".

Section 6. Subdivision 4 of section 1 of said chapter 151B, as appearing in section 4 of chapter 368 of the acts of 1946, is hereby amended by striking out, in line 1 and in line 2, the word "employment". *Approved June 7, 1957.*

HOUSING
Public Housing—New York

Chapter 981 of the Laws of New York, 1957, approved April 26, 1957, amends that state's public housing laws so as to give preference as tenants in a public housing project to persons residing within a radius of one mile of the project.

AN ACT to amend the public housing law, in relation to giving preference as tenants in a public housing project to eligible persons and families residing within a radius of one mile from such project.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one hundred fifty-six of the public housing law is hereby amended by adding thereto a new subdivision, to be subdivision five, to read as follows:

5. Priority and preference in the rental of apartments in any project shall be given to eligible persons and families residing within a radius of one mile of such project, without regard to race, religion, color or national origin, in order to preserve the roots of such persons and families who have ties and other interests in a particular community, church, synagogue, settlement house, hospital or medical or dental services and facilities within such area; but nothing herein contained shall be construed to grant such priority and preference until all eligible persons and families entitled to priority and preference by virtue of their status as site tenants or veterans, shall first have been admitted as tenants in such project.

Section 2. This act shall take effect July first, nineteen hundred fifty-seven.

HOUSING
Investigating Commission—Minnesota

Chapter 953 of the Minnesota Laws, 1957, approved April 29, 1957, creates a commission to investigate discrimination on the basis of race, color, creed or ancestry in the acquisition or use of housing accommodations. The act declares that the acquisition, use or enjoyment of real property without discrimination is a civil right.

AN ACT creating a commission to investigate and study discrimination and segregation because of race, color, creed, religion, national origin or ancestry in the sale, lease, sublease, transfer, use occupancy, tenure, acquisition or enjoyment of property or housing accommodations; and for the encouragement of the human rights commission and the fair employment practice commission; and providing for cooperation with other governmental agencies.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, color, creed, religion, national origin or ancestry are a matter of state concern, that such discriminating threatens not only the rights and proper privileges of its inhabitants but menaces and undermines the institutions and foundations of a democratic state. The legislature hereby finds and declares that discrimination or segregation in the sale, lease, sublease, use occupancy, tenure, acquisition or enjoyment of property or housing accommodations because of race, color, creed, religion, national origin or ancestry tends unjustly to condemn large groups of inhabitants to depressed and substandard living conditions which are inimical to the general welfare and contrary to our democratic way of life. The aforementioned practices of discrimination and segregation in the sale, lease, sublease, use occupancy, tenure, acquisition or enjoyment of property or housing accommodations because of race, color, creed, religion, national origin or ancestry are declared to be against the public policy of this state.

Section 2. The opportunity to buy, acquire, lease, sublease, occupy and use and enjoy property and to obtain decent living and housing accommodations without discrimination because of race, color, creed, religion, national origin or ancestry is hereby recognized and declared to be a civil right.

Section 3. A commission to investigate and study discrimination and segregation because of race, color, creed, religion, national origin or ancestry in the sale, lease, sublease, transfer, use occupancy, tenure, acquisition or enjoyment of property or housing accommodations as well as investigating the possibility of strengthening the states civil rights program by encouraging the work of the governor's human rights commission and the fair employment practice commission with possible recommendations as to their organization, is hereby created to consist of five members of the senate, to be appointed by the committee on committees, and five members of the house of representatives to be appointed by the speaker. The appointment of such commission shall be made upon passage of this act.

Section 4. The commission may hold meetings at such times and places as it may designate. It shall select a chairman, and such other officers from its membership as it may deem necessary.

Section 5. The commission may subpoena witnesses and records and employ such assistants as it deems necessary to perform its duties effectively. It may do all the things necessary and convenient to enable it to perform its duties.

Section 6. The revisor of statutes and every other state agency shall cooperate with the commission in all respects so that its purpose may be accomplished. The commission shall use the available facilities and personnel of the Legislative Research Committee unless the commission by resolution determines a special need or reason exists for the use of other facilities or personnel.

Section 7. The commission shall report to the legislature on or before January 15, 1959, setting forth its recommendations.

Section 8. The members of the commission shall be reimbursed for all expenses actually and necessarily incurred in the performance of their duties.

Section 9. The sum of $10,000, or so much thereof as may be necessary, is hereby appropriated from the state treasury for the use of this commission.

ORGANIZATIONS
Registration—Arkansas

Ordinance No. 10,638 of the city of Little Rock, Arkansas, passed on October 14, 1957, requires the registration and filing of certain information by any organization upon the request of city officials. Similar ordinances were enacted in other Arkansas cities (e.g., Ordinance No. 2683, North Little Rock, Arkansas, October 14, 1957) following a form suggested by the state Attorney General. Press reports state that action has been taken under the ordinance in Little Rock against officers of the local chapter of the National Association for the Advancement of Colored People.

An ordinance requiring certain organizations functioning or operating within the City of Little Rock, Arkansas to list certain information with the city clerk; and for other purposes.

WHEREAS, it has been found and determined that certain organizations within the City of Little Rock, Arkansas, have been claiming immunity from the terms of Ordinance No. 7444, as amended, governing the payment of occupation licenses levied for the privilege of doing business within the city, upon the premise that such organizations are benevolent, charitable, mutual benefit, fraternal or non-profit, and

WHEREAS, many such organizations claiming the occupation license exemption are mere

subterfuges for businesses being operated for profit which are subject to the occupation license ordinance; NOW, THEREFORE,

Be it ordained by the city council of the City of Little Rock, Arkansas:

Section 1. The word "organization" as used herein means any group of individuals, whether incorporated or unincorporated.

Section 2. Any organization operating or functioning within the City of Little Rock, including but not limited to civic, fraternal, political, mutual benefit, legal, medical, trade, or other organization, upon the request of the Mayor, Alderman, Member of the Board of Directors, City Clerk, City Collector, or City Attorney, shall list with the City Clerk the following information within 15 days after such request is submitted:

A. The official name of the organization.

B. The office, place of business, headquarters or usual meeting place of such organization.

C. The officers, agents, servants, employees or representatives of such organization, and the salaries paid to them.

D. The purpose or purposes of such organization.

E. A financial statement of such organization, including dues, fees, assessments and/or contributions paid, by whom paid, and the date thereof, together with the statement reflecting the disposition of such sums, to whom and when paid, together with the total net income of such organization.

F. An affidavit by the president or other officiating officer of the organization stating whether the organization is subordinate to a parent organization, and if so, the name of the parent organization.

Section 3. This ordinance shall be cumulative to other ordinances heretofore passed by the City with reference to occupation licenses and the collection thereof.

Section 4. All information obtained pursuant to this ordinance shall be deemed public and subject to the inspection of any interested party at all reasonable business hours.

Section 5. Any section or part of this ordinance declared to be unconstitutional or void shall not affect the remaining sections of the ordinance, and to this end the sections or subsections hereof are declared to be severable.

Section 6. Any person or organization who shall violate the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than $50.00 nor more than $250.00, and each day of violation shall constitute a separate offense. The City Council in the enforcement of this ordinance shall have the power to seek injunctive relief.

Section 7. It has been found and determined by the City Council that certain organizations operating within the City of Little Rock have failed to comply with the terms of Ordinance No. 7444, as amended, governing the payment of occupation licenses, and as a result thereof, needed revenue is being lost, and the enactment of this ordinance will provide for more efficient administration of such ordinance. Therefore, an emergency is declared to exist, and this ordinance being necessary for the preservation of the public peace, health, and safety, shall take effect and be in force from and after its passage and approval.

PASSED: October 14, 1957
ATTEST:
W. C. Ware
City Clerk

APPROVED:
Woodrow W. Mann
Mayor

LITIGATION

Legislative Investigation—Virginia

The Committee on Law Reform and Racial Activities of the General Assembly of Virginia (Delegate James M. Thomson, Chairman) created pursuant to Chapter 37, 1956 Extra Ses-

sion Acts of Virginia (2 Race Rel. L. Rep. 1023) has made its report. The report considers activities of the NAACP in the conduct of school integration cases and makes recommendation for further investigations into litigation activities and school texts.

REPORT OF THE COMMITTEE ON LAW REFORM AND RACIAL ACTIVITIES OF THE GENERAL ASSEMBLY OF VIRGINIA

To: The Honorable Thomas B. Stanley, Governor of Virginia, and the Members of the House of Delegates and the Senate of the Commonwealth of Virginia:

The Committee on Law Reform and Racial Activities of the General Assembly of Virginia respectfully submits the following report.

This Committee is a Joint Committee of the House of Delegates and the Senate created pursuant to the provisions of Chapter 37, Acts of the General Assembly, Extra Session 1956. The Act authorizing the creation of the Committee is set forth below:

1. § 1. There is hereby created a Legislative Committee, to be composed of six members of the House appointed by the Speaker thereof, and four members of the Senate appointed by the President thereof.

§ 2. The Committee is authorized to make a thorough investigation of the activities of corporations, organizations, associations and other like groups which seek to influence, encourage or promote litigation relating to racial activities in this State. The Committee shall conduct its investigation so as to collect evidence and information which shall be necessary or useful in

(1) determining the need, or lack of need, for legislation which would assist in the investigation of such organizations, corporations and associations relative to the State income tax laws;

(2) determining the need, or lack of need, for legislation redefining the taxable status of such corporations, associations, organizations and other groups, as above referred to, and further defining the status of donations to such organizations or corporations from a taxation standpoint; and

(3) determining the effect which integration or the threat of integration could have on the operation of the public schools in the State or the general welfare of the State and whether the laws of barratry, champerty and maintenance are being violated in connection therewith.

§ 3. Said Committee may hold hearings anywhere in the State, and shall have authority to issue subpoenas, which may be served by any sheriff or city sergeant of this State, or any agent or investigator of the Committee, and his return shown thereon, requiring the attendance of witnesses and the production of papers, records and other documents. If any person, firm, corporation, association or organization which fails to appear in response to any such subpoena as therein required, or any person who fails or refuses, without legal cause, to answer any question propounded to him, then upon the application by the Chairman, or any member of the Committee acting at his direction, to the circuit or corporation court in the county or city wherein such person resides or may be found, such court shall issue an order directing such person to appear and testify. The Committee may, at its option, compel attendance of witnesses or production of documents by motion made before the circuit or corporation court having jurisdiction of the person or documents whose attendance or production is sought. The court upon such motion shall issue such subpoenas, writs, processes or orders as the court deems necessary. The Chairman of the Committee, or anyone acting at his direction, shall be authorized to administer oaths to all witnesses and to issue subpoenas. Every witness appearing pursuant to subpoena shall be entitled to receive, upon request, the same fee as is provided by law for witnesses in the courts of record in the State, and where the attendance of witnesses residing outside the county or city wherein the hearing is held is required, they shall be entitled to receive the sum of seven dollars after so appearing, upon certification thereof by the Chairman to the State Comptroller.

§ 4. Each member of the Committee shall receive, in addition to actual travel expenses, the same per diem as received by

members of other legislative committees, while engaged in official duties as a member of said Committee.

§ 5. Said Committee shall be authorized to employ clerical force and such investigators and other personnel as it may deem necessary to carry out the provisions of this act, and may expend moneys for the procuring of information from other sources.

§ 6. The Attorney General shall assist the Committee upon request, and the Committee may engage such other legal counsel as it shall deem necessary.

§ 7. The Committee shall complete its investigations and make its report, together with any recommendations as to legislation, to the Governor and the General Assembly not later than November one, nineteen hundred fifty-seven.

2. There is hereby appropriated from the general fund of the State treasury the sum of twenty-five thousand dollars to carry out the purposes of this act.

The members of the Committee are as follows:

Del. George E. Allen, Jr., P. O. Box 1653, Richmond, Virginia

Del. Charles B. Cross, Jr., Law Building, Portsmouth, Virginia

Del. Frank P. Moncure, Stafford, Virginia

Del. H. H. Purcell, Louisa, Virginia

Del. R. M. Smith, Kenbridge, Virginia

Del. James M. Thomson, Box 324, Alexandria, Virginia

Sen. George S. Aldhizer II, Broadway, Virginia

Sen. Earl A. Fitzpatrick, State City Bank Bldg., Roanoke, Virginia

Sen. Mills E. Godwin, Jr., Suffolk, Virginia

Sen. Landon R. Wyatt, 627 Main Street, Danville, Virginia

The organizational meeting of the Committee was held in the House Appropriations Committee Room at the State Capitol in Richmond on January 10, 1957, at which time Delegate James M. Thomson was named as Chairman, and Senator Earl A. Fitzpatrick was named as Vice-Chairman. At a meeting held at the same place on January 25, 1957, arrangements were made for the employment of Mr. Leslie Hall of Alexandria, Virginia, as Chief Counsel for the Committee, and the Committee adopted resolutions at that time providing for the holding of hearings by a quorum of at least three members of the Committee, providing for the setting up of an office, the employment of a Secretary and Investigators, and providing that all hearings would be executive unless the Committee should subsequently decide otherwise.

It was determined to commence operations by obtaining as much information as possible on a voluntary basis before resorting to the use of subpoenas for that purpose.

[*Organizations Contacted*]

In pursuance of this purpose, Counsel for the Committee contacted various organizations, and obtained from them replies which may be summarized as follows:

The organizations contacted were the Defenders of State Sovereignty and Individual Liberties, a Virginia Corporation, the National Association for the Advancement of Colored People, a New York Corporation, the NAACP Legal Defense and Educational Fund, Inc., a New York Corporation, and the Virginia State Conference of NAACP Branches, an unincorporated association.

The Defenders of State Sovereignty and Individual Liberties cooperated fully and complied with every request of the Committee. In fact, this organization furnished to the Committee voluminous and detailed accounts of its activities, its financial records, its membership lists, the names and addresses of its Officers, and offered to cooperate further with the Committee in any way that might be required. There was nothing in the information supplied voluntarily to the Committee by this organization which indicated that it had in any way been engaged in influencing, encouraging, or promoting litigation relating to racial activities in this State. However, at a hearing held by the Committee at the State Capitol on March 12, 1957, the Executive Director of this organization was called as a witness and further interrogated with regard to the matter. His testimony before the Committee confirmed the information given voluntarily. In addition, the Committee caused an independent investigation to be made to determine whether it would be necessary to further inquire into the activities of this organization if it should appear that it might come within the scope of the inquiries authorized by the Act.

The Committee has found no justification for calling other witnesses who might shed light on the activities of this organization.

[*Statements of NAACP*]

Counsel for the Committee received from the National Association for the Advancement of Colored People, Inc., the NAACP Legal Defense and Educational Fund, Inc., and the Virginia State Conference of NAACP Branches, general statements as to the organizational set-up of each of these organizations, together with financial statements showing the aggregate of all expenditures and disbursements made by the organization within the State of Virginia during the year 1956. However, each of these organizations notified Counsel for the Committee that it would resist any effort on the part of the Committee to obtain more detailed information. They followed up this advice by filing a suit in the United States District Court for the Eastern District of Virginia at Richmond, seeking a temporary restraining Order and an Injunction against the Committee, as well as questioning the constitutionality of the Act under which the Committee was created. The request for a temporary restraining Order was denied by Judge Sterling Hutcheson. Thereafter, a three Judge Court was convened in view of the constitutional questions involved. After a full presentation of the Committee's position by Counsel for the Committee, the Court held in abeyance the request for an Injunction, and retained jurisdiction of the case pending a decision by the Supreme Court of Appeals of Virginia on a suit involving subpoenas issued out of the Hustings Court of the City of Richmond at the request of the Committee on Offenses Against the Administration of Justice (Boatwright Committee).

The Committee convened for a hearing in Richmond on March 12, 1957, at which time the information previously voluntarily submitted to Counsel for the Committee was considered, and five officials of the NAACP and one official of the Defenders were questioned.

From the information voluntarily furnished to the Committee, and from the testimony of the various officials of the NAACP at this hearing, it was developed that the National Association for the Advancement of Colored People, Inc., a New York Corporation, had been doing business in Virginia for many years without having qualified as a foreign corporation until 1956. It was also developed that the NAACP Legal Defense and Educational Fund, Inc., a New York Corporation, which was formed in 1939, had been doing business in this State almost from its inception, without having qualified as a foreign corporation until 1956. The Virginia State Conference of NAACP Branches is an unincorporated association with its headquarters in Richmond, Virginia. All three of these organizations are answerable to policies, directives, and instructions emanating from the national headquarters of the NAACP in New York. Although they maintain that each local Branch, each State Conference, the NAACP Legal Defense and Educational Fund, Inc., and the National Association for the Advancement of Colored People, Inc., are separate and distinct organizations, all of the evidence developed by the Committee points to the fact of central control.

[*NAACP Expenditures*]

Although the Committee did not have the time nor the facilities to inquire into the financial operations of these various organizations except for recent periods, the Committee is satisfied that enormous sums of money have been collected and spent for the purpose of promoting racial litigation in this State. Typical of what the Committee has been able to learn is the fact that during 1956, the NAACP Legal Defense and Educational Fund, Inc., reported that it had received from contributors in Virginia during that year a total of $1,859.20, and that during the same year it had expended a total of $6,490.00, most of which was for Attorneys' fees and Court costs. During the same year, the National Association for the Advancement of Colored People, Inc., reported that it had received a total of $47,264.01, and had spent in the State of Virginia in that year $9,935.19; or an excess of receipts over expenditures in the amount of $37,328.82. The Virginia State Conference of NAACP Branches reported receipts during 1956 of $40,587.95 and expenditures during that year $29,661.52; or an excess of receipts over expenditures in the amount of $10,926.43.

In the case which was filed against the Committee by the National Association for the Advancement of Colored People, the Virginia State Conference of NAACP Branches, and W. Lester Banks in the United States District Court for the Eastern District of Virginia, Richmond Di-

vision, (Civil Action No. 2480), the Complainants alleged in their complaint that they "have sought to give aid to Negro citizens of the State of Virginia who have sought their aid in the matter of helping such citizens to secure their right to attend the public schools of the State of Virginia and other public facilities free from State imposed restrictions based solely upon race and color." It is further alleged in the complaint filed in that suit that the Complainants have jointly and severally carried on their operations "by encouraging Negro citizens to assert their constitutional rights and seek redress in the courts wherever necessary"; "by contributing to the payment of fees or expenses incident to the prosecution of litigation involving the constitutionality of racially discriminatory governmental action; and by aiding in defraying expenses of such litigation from funds raised by public solicitation". (Bill of Complaint, p. 11, Tr. p. 112-113). Not only was this assertion made in the Bill of Complaint, but NAACP Counsel repeatedly contended in their oral arguments in this and other Court proceedings that these organizations had the right under the United States Constitution to encourage and to finance litigation with respect to racial matters. All of the testimony at this hearing and at other hearings held by the Committee shows that, without exception, every one of the school integration suits in the State of Virginia has been financed by these interlocking organizations, and that in no instance has an individual Plaintiff directly paid any part of the cost of such litigation. With regard to the contention which was made that the organizations had a legal right to act as they did, when questioned as to whether they thought that other organizations had a similar legal right, one of the witnesses, Oliver W. Hill, throughout his testimony (tr. p. 161-214) endeavored to place the NAACP organizations in a preferential category in this regard.

PRINCE EDWARD COUNTY

The Committee on Law Reform and Racial Activities held a hearing in Farmville, Virginia, on May 15 and 16, 1957. The interview was confined almost exclusively to Plaintiffs in the school integration suit brought against the County School Board of Prince Edward County. Twenty-three witnesses were called before the Committee to testify. Of the total number of witnesses, the majority did not choose to be represented by Counsel.

These witnesses testified as to the origin of the suit against the Prince Edward County School Board. Attorneys for the NAACP, from Richmond, came to Farmville, and addressed parents and students in the local colored high school. Authorizations for these Negro Attorneys to represent the colored children were circulated at that meeting and signatures were obtained to permit the NAACP Attorneys to file a suit using the names of the people at that meeting. The authorizations which were signed are of two general types. The first type reads as follows:

> "I (we) do hereby authorize Hill, Martin and Robinson, Attorneys of the City of Richmond, Virginia, to act for and on behalf of me (us) and for and on behalf of my (our) child (children) designated below, to secure for him (her, them) such educational facilities and opportunities as he (she, they) may be entitled under the Constitution and laws of the United States and of the Commonwealth of Virginia, and to represent him (her, them) in all suits, matters and proceedings, of whatever kind of character, pertaining thereto."

These authorizations were signed in April and May of 1951.

The second form used states as follows:

> "I, (we), ...,
> hereby employ Hill, Martin & Robinson, Attorneys, to represent me or us and the above named child or children in any and all matters pertaining to the segregation of my child or children in the public schools of Prince Edward County, Virginia, or any other County, Town, or City to which they may be assigned.
>
> "The said Attorneys have the authority to appear in my or our behalf before any Board, Committee, Department or Commission and any other official body or individual official relative to securing a racially non-segregated education for my or our child or children.
>
> "Said Attorneys are further expressly authorized to institute or defend actions or proceedings in any appropriate Court, State or Federal, which they deem necessary to protect my or our constitutional

rights or the constitutional rights of my or our child or children to receive a racially non-segregated and non-discriminated public school education."

These authorizations were used much later in the proceeding primarily to add new plaintiffs in the suit. It should be noticed that while the contact was made through the NAACP, that the authorizations specifically designate a private law firm, i.e., Hill, Martin, and Robinson to represent the individual or individuals.

When the first authorization is compared with the second authorization, there is a very obvious discrepancy. The second authorization clearly states that the Attorneys should seek to bar segregation in public education. This can hardly be said of the first authorization form which was used. It will be noticed that in this form the Attorneys were only authorized to institute suits to obtain such educational facilities as the Plaintiffs were entitled to under the United States and the Virginia Constitution. Clearly, at that time, segregation was recognized under both the United States and the Virginia Constitution.

That was the last contact that these lawyers, Hill, Martin and Robinson had with their supposed clients. The suit was prosecuted in the Federal Court without any further communication between Attorneys and clients. Almost uniformly, the witnesses appearing before the Committee in Farmville, testified to three substantial facts: *First*, that they had been told that a suit would be filed to get better schools; that they had gotten a new school; and consequently, felt that all legal action was over; *Second*, that in many instances, they did not even know that their names were used as Plaintiffs in the suit until contacted by Investigators for the Committee; *Third*, that they did not know that the suit brought by the lawyers, Hill, Martin, and Robinson, was for the purpose of integrating white and colored children in the public schools.

There was an exception to this uniformity of testimony. Those witnesses coming before the Committee to testify who were represented by Counsel, substantially altered their testimony so as to place in question whether or not the witnesses not represented by Counsel were telling the truth, or whether the witnesses represented by Counsel were telling the truth. It was found during the hearing that the NAACP lawyers had arrived in Farmville and held a meeting with those witnesses that they were to represent. They discussed with those witnesses the substance of the testimony they were to give. Those witnesses who were represented by Counsel had previously given statements to investigators for the Committee and these statements were tape-recorded by the Investigators without the knowledge of the witnesses. On one occasion when one of the witnesses represented by NAACP Counsel had completely altered her testimony as to the origin of the Prince Edward County suit and as to her participation in it, the tape-recording was played back to her. On another occasion one of the witnesses represented by NAACP Counsel took himself off the spot, by stating he had lied to the Investigators. In his testimony to the Committee he stated he knew the real purpose of the suit and was in accord with it.

Uniformly all witnesses who were Plaintiffs in the Prince Edward County suit testified that they had not paid Court costs or Attorneys fees and did not anticipate paying for the same. No arrangements had been made between Attorney and Client.

The Committee feels that several matters which arose from this two-day hearing deserve special mention. *First* of all, the manner in which the Attorneys obtained these clients is reprehensible. *Secondly*, these hearings indicate to the Committee that the NAACP, the NAACP Legal Defense and Educational Fund, Inc., New York Corporations, and the Virginia State Conference of NAACP Branches, an unincorporated association, are now and have been engaged in the unauthorized practice of the law.

NORFOLK

The Committee held a hearing at the Court House in Norfolk on August 15, 1957, at which time twenty-one witnesses were subpoenaed to appear and testify. All of the witnesses for whom subpoenas were issued were Plaintiffs in the case brought against the School Board of the City of Norfolk for the integration of the schools in that City.

In addition to the Plaintiffs, on the day of the hearing, the Committee also caused subpoenas to be issued calling for the testimony of J. Hugo Madison and Victor J. Ashe, who appeared as Attorneys of record in this suit, and who also appeared as Attorneys for several of the witnesses. The reason their testimony was sought was that the Committee learned of a meeting

held between some of the Plaintiffs and these Attorneys the night before the hearing. Both of these Attorneys, when called to testify as to their connection with the suit and as to how they were retained, refused to give any answers to the questions propounded to them by the Committee. Whereupon, the Committee obtained an Order from the Judge of the Circuit Court of the City of Norfolk for a Rule against these Attorneys to require them to show cause why they should not be compelled to answer the questions propounded to them by the Committee. Upon the Court's having ordered these two witnesses to respond to the questions, they elected to stand on their rights under the Fifth Amendment to the United States Constitution.

[*Testimony of Plaintiffs*]

The Committee called and questioned ten other witnesses with regard to the manner in which their names came to be used as Plaintiffs in the case. Most of the witnesses in this particular case indicated that they became Plaintiffs because of the fact that they were dissatisfied with the distance which their children had to travel in order to reach the school in which they were assigned. Some of the Plaintiffs were very definitely in favor of integration, while others seemed to be more interested in obtaining better schools for their children. It is worthy of note that one parent who was a Plaintiff, has never had any children in public schools, but has always sent her children to Parochial schools (Tr. p. 158). It is also worthy of note that another witness, who purportedly signed an authorization for the Attorneys to represent her in the case, testified that she could neither read nor write and that she never signed any paper or otherwise engaged the services of an Attorney to represent her in this suit or any other kind of a suit (Tr. p. 162). She denied ever having talked with Attorneys Madison, Ashe, Oliver W. Hill, or Spottswood W. Robinson III, at any time with regard to their representation of her in a suit against the School Board or in any other kind of legal action. She further stated that all she was interested in was obtaining a good school with equal facilities for her wards.

As was determined in the Farmville hearing, it was likewise developed at the hearing in Norfolk that none of the Plaintiffs either paid or agreed to pay Attorneys' fees or Court costs, nor has any one of them been billed for such fees and costs. It also developed, as in the Farmville case, that several of the Plaintiffs did not even know that they were parties to the suit until contacted by the Committee's Investigators.

The Committee would like to point out that several days after the adjournment of the Norfolk hearing, Attorneys Madison and Ashe sent a telegram to the Chairman of the Committee advising him that they had reconsidered and would like to withdraw their plea of the Fifth Amendment and to appear and testify at the convenience of the Committee. Time did not permit this to be done.

[*Financial Status of Plaintiffs*]

The representatives of the National Association for the Advancement of Colored People, and the NAACP Legal Defense and Educational Fund, Inc., have repeatedly represented to the Courts and to the Committee that they felt a legal justification existed for representing the Plaintiffs in the various school integration suits due to the fact that the Plaintiffs were financially unable to finance such suits. In view of their unwavering insistence on this supposed right, the Committee caused investigations to be made as to the financial worth of the Plaintiffs in the Norfolk case, and followed this up by having similar investigations made as to the financial worth of Plaintiffs in other cases. An example of the financial standing of some of the Plaintiffs is indicated in the case of one woman Plaintiff whose husband owns two grocery stores, and has numerous parcels of real estate free and clear of any recorded encumbrances, the total estimated value of such real estate being in the neighborhood of $75,000.00. Some of the Plaintiffs own, in addition to real estate, anywhere from two to five motor vehicles.

Further glaring examples of the financial worth of some of the Plaintiffs will appear in more detail with respect to the Plaintiffs in the integrations suit brought against the School Board of Arlington County.

ARLINGTON

The Committee convened at the Court House in Arlington County on September 19, 1957, for the purpose of questioning some of the Plaintiffs in the integration suit brought against the County School Board of Arlington County, as well as for the purpose of questioning certain other parties and examining certain documentary evi-

dence with respect to integration suits in the Tenth District. On September 19, 1957, six witnesses were called and questioned, and a number of checks and other exhibits were introduced into evidence. Among those examined that day, were Edwin C. Brown, Regional Counsel for the NAACP; Mrs. Geraldine Davis, a white woman who accompanied several Negro children to a white Junior High School at the opening of the present school term; Jack C. Orndorff, who was an original Plaintiff in this suit, but who later withdrew; and three Officials of the local Branch of the NAACP.

The Committee was aware of the fact that other attorneys had been paid for their services by the NAACP or the NAACP Legal Defense and Educational Fund, Inc. In view of Mr. Brown's contention that he had received no fees for his services in connection with this suit, he was asked to produce his financial records, which he refused to do. An Order was obtained from the Circuit Court of Arlington County requiring the production of such records, and some subsequently were produced to the Committee and Committee Counsel. He maintained that he did not have a fee book for the period in question, but did make available certain other records. An examination of the records produced did not show any fees as having been received by Mr. Brown from any source for his services in connection with this suit. He was subsequently called to a Committee hearing in Alexandria on October 23, 1957, at which time he reaffirmed his previous statement and assured the Committee that he had produced all of the financial records in his possession for the period of time in question.

Mrs. Geraldine Davis, who sought to enroll several Negro children in an all white school, is the Treasurer of the local Branch of the NAACP, and has been active in that organization for several years, although she is not a Plaintiff in the integration suit.

Mr. Orndorff gave as his reason for withdrawing from the suit the fact that he and his family had received numerous anonymous telephone calls of a threatening nature with regard to his participation in the suit. The other witnesses called on this day were definitely in favor of integration and appeared to be volunteers in the matter.

[*Further Hearing*]

The Arlington hearing was continued on September 20, 1957, at which time nine other witnesses were questioned with regard to their participation in the Arlington County suit, as well as the suit brought by Mrs. Theo T. DeFabio against the school Officials of Fairfax County, and other matters related to the institution of racial litigation in the Tenth District.

Albert I. Kassabian and C. Douglas Adams, Jr., Attorneys for Mrs. Theo T. DeFabio, objected very strenously to testifying before the Committee. They and their client did testify that no organization was responsible for the institution of the suit by Mrs. DeFabio, nor was any organization financing this suit, which seeks to test the legality of the Pupil Placement Act.

One David H. Scull, of Annandale, Virginia, was called as a witness before the Committee because the Committee had received information which indicated that Mr. Scull was connected with numerous organizations which have been active in promoting racial litigation in this State. Mr. Scull appeared with Mr. Joseph Fanelli, an Attorney from the District of Columbia, and after answering formal questions as to his name, address, and occupation, presented to the Committee a written statement of his reasons for refusing to testify, in which he challenged the constitutionality of the Act and the jurisdiction of the Committee.

He based his refusal to testify "on the basis of all the rights accorded me under Sections 8, 11, and 12 of the Constitution of the Commonwealth of Virginia and the correlative provisions of the Federal Constitution."

[*Court Order Obtained*]

On the basis of the above statement, the witness refused to answer any further questions put to him by the Committee, including his connections with a number of organizations, or whether a post-office box listed in his name was used by those organizations. The Committee thereupon sought and obtained from the Circuit Court of Arlington County, a Rule against Mr. Scull to require him to appear and show cause why he should not be required to answer the questions propounded to him. This Rule was heard by the Court on October 15, 1957, at which time Mr. Scull was represented by Joseph L. Rauh, Jr., former president and presently vice-chairman of the Americans for Democratic Action, and

John Silard, of the District of Columbia Bar, and Karl G. Sorg, of the Arlington County Bar. At the hearing on the Petition, Counsel for Mr. Scull relied chiefly on the provisions of the Fourteenth Amendment to the U. S. Constitution. After a full hearing, the Court granted the Petition of the Committee to require the witness to testify, and refused to stay the execution of its Order pending an Appeal. Thereupon, the next day, Counsel for Mr. Scull appeared before the Supreme Court of Appeals of Virginia and moved for a Stay of the Order of the Circuit Court of Arlington County, which Motion was opposed by the Chief Counsel for the Committee, and was denied. Subsequently, on October 21, 1957, Counsel for Mr. Scull filed an Application with the Chief Justice of the Supreme Court of the United States for a Stay of said Order, which Application was likewise opposed by the Chief Counsel for the Committee. On October 22, 1957, the Application for Stay was denied by Chief Justice Warren. On October 23, pursuant to the Order of the Circuit Court of Arlington County, Mr. Scull appeared before the Committee with Counsel. After making a brief statement to the effect that he still believed that the Committee was illegally constituted and was acting illegally, he categorically refused to answer any questions put to him by the Committee. On October 24, 1957, Counsel for the Committee obtained from the Circuit Court of Arlington County a Rule against Mr. Scull to require him to show cause on October 30 why he should not be held in Contempt of Court and punished accordingly. The Committee believes that if it had been able to obtain testimony from this witness, such testimony would have been very helpful to the Committee in making its report.

[*Financial Investigation*]

As was pointed out in the report with regard to the Norfolk case, the Attorneys for the NAACP have repeatedly asserted that the reason they and the NAACP organizations felt justified in carrying on the school integration cases was that the individual plaintiffs were not financially able to bear the expense of Attorneys' fees and Court costs in such cases. In view of this contention, the Committee felt that it would be wise to ascertain something with regard to the financial status of the various individuals involved. When the suit in Arlington County was originally commenced, most of the plaintiffs were Negroes, the exceptions being three white Plaintiffs. When two of the white Plaintiffs withdrew, a number of other parties were allowed to intervene as Plaintiffs. Without exception, those intervening were all White.

The Committee had its Investigators make a check of the records to obtain information bearing on the financial worth of the Plaintiffs in this suit. The results of this check points to the fact that practically every one of the Plaintiffs in this suit was of such standing as would warrant the inference that he or she was in the category of a person who could afford the services of an Attorney and could bear some part of the cost of litigation. As instances justifying this conclusion, the following information is of interest.

[*Plaintiffs' Worth*]

One Plaintiff is a Magazine Editor for McGraw Hill Publishing Company. The family lives in a high-class white neighborhood in Arlington and owns a recent model automobile. Another, a Negro, is an Electrical Contractor, and has three motor vehicles listed in his name, as well as being the owner of his home. Another is a White physician with offices in Washington, and has two motor vehicles in the family. One White woman, whose husband is an Economist with the United States Department of Agriculture, lives in a very respectable Arlington neighborhood; there are two motor vehicles in the family; and the land records show two parcels of improved real estate having an estimated total value of approximately $38,000.00. Another Plaintiff is an electrical engineer with the Bureau of Ships (Navy), and the family owns its own home. Another is a draftsman who works for Mills, Petticord & Mills, and two late model automobiles, with no recorded liens, are in the family, as well as a home valued at $17,000.00. Another woman and husband have two automobiles, as well as real estate. One original White Plaintiff has two automobiles, on which no liens are recorded, and real estate estimated to be worth in the neighborhood of $35,000.00, as well as income by way of alimony and support in the amount of $4,000.00 per annum or 2/5 of her husband's annual income, whichever is greater. Another Plaintiff and wife own an automobile and have a home in a nice residential area. He is Office Manager for Air Surveys, Inc. Another is an Information Specialist with the

Civil Aeronautics Administration. He and his wife own a home in one of the nicer white neighborhoods of Arlington and there are three motor vehicles in the family. In addition, a doctor, who recently intervened in this suit, is a prominent and well-to-do Negro physician.

In view of the apparent financial status of these individuals, it would seem that the contentions which have been made by the organizations are not well-founded.

The Committee had sought in all of its hearings and by other means to obtain some definite evidence and testimony as to the exact method employed in obtaining the names of the Plaintiffs to be used in the school integration suits, and also what instructions, if any, emanated from the various NAACP organizations or officials with regard thereto. Among the most valuable information obtained by the Committee along this line was that developed at the Arlington hearing. The Committee obtained by *subpoenas duces tecum* copies of certain minutes of the Arlington Branch of the NAACP, as well as certain correspondence and other documents dealing with this subject.

At a meeting of the Board of Directors of the NAACP on October 9, 1950, in New York City, it was reported that at a Conference of NAACP lawyers held in New York on June 26-27, 1950, the following resolution was adopted:

> "Pleadings in all educational cases—the prayer in the pleading and proof is to be aimed at obtaining education on a non-segregated basis and that no relief other than that will be acceptable as such.
>
> "Further, that all lawyers operating under such rule will urge their clients and the branches of the Association involved to insist on this final relief."

Mrs. Barbara Marx testified that she attended a NAACP State Conference in Petersburg on June 12, 1955, at which time, she, Attorney Thomas R. Monroe, and others from the Arlington Branch, talked with Oliver W. Hill and Spotswood W. Robinson III, about the presentation of Negro children for admission to the White Washington-Lee High School. She testified that they were told by Hill and Robinson that this would be premature, and that they should go back to Arlington, be patient, and that in due time a petition form would be drawn up by the State legal staff, which would be furnished to the Branches.

On June 30, 1955, a "Confidential Directive" was circulated to the member Branches of the Virginia State Conference, enclosing a form of a Petition to be used by the various Branches in petitioning the local School Boards for desegregation prior to the institution of any further suits. This Confidential Directive gave detailed instructions as to the method to be used in processing such petitions, as well as the types of persons who should be contacted to sign the Petitions. Paragraph six of the instructions reads as follows:

> "The signing of the petition by a parent or guardian may well be only the first step to an extended Court fight. Therefore, discretion and care should be exercised to secure petitioners who will—if need be—go all the way."

This Confidential Directive went out over the signatures of W. Lester Banks, Executive Secretary, and J. M. Tinsley, President of the Virginia State Conference of Branches. This Confidential Directive, and a copy of the Petition are among the exhibits in the Committee's files.

An Executive Committee meeting of the Arlington Branch was then held at which circulation of the Petition was discussed, and it was signed by a number of those present. Mrs. Marx also obtained additional signatures later.

The Petition was presented to the Arlington County School Board on July 28, 1955.

On October 9, 1955, Mrs. Marx attended a State Convention of the NAACP in Charlottesville, at which time Spotswood W. Robinson III, came up to her and told her that he was going to get in touch with Attorney Edwin C. Brown, of Alexandria, and ask Brown to make himself available for signing of authorizations in his presence so that they could proceed with the Arlington case. Brown had not been in the suit up until that time. (Tr. p. 105)

Subsequently, a small meeting was held in Arlington, at which Attorney Brown was present, and that was the first time Mrs. Marx saw the authorization forms. Several of the forms were signed at that time by persons who became parties to the suit.

Mrs. Marx, herself, contacted others with regard to signing the authorizations.

She also testified that some of the Plaintiffs were not informed of the filing of the suit until they read it in the newspapers.

It is noted that the authorization only author-

ized Edwin C. Brown to represent the plaintiffs and did not name any other attorneys.

Mrs. Barbara Marx, a State Director of the NAACP, and also an official of the Arlington County Branch of the NAACP, gave valuable information to the Committee along these lines. (Tr. p. 97-136, 9/20/57). In addition she identified the minutes of the Arlington County Branch of the NAACP dealing with the institution and maintenance of racial litigation. With the consent of the witness, copies were made of these minutes, and they are in the Committee's files. Noteworthy, are the minutes of a meeting held on August 2, 1956, at which a Motion to help defray the expenses of the Arlington County School suit was unanimously approved and $250.00 was appropriated for this purpose. There were several references in the minutes to appropriations and contributions to the "Freedom Fund", which has been identified as having as its primary purpose, the financing of integration litigation.

Mrs. Marx gave to the Committee testimony confirming previous evidence as to the close relationship between the various NAACP Organizations, and as to the answerability of the local Branches to Instructions and Directives from the National Organization.

It is apparent from the information obtained in the Arlington hearing that a direct attack on segregated schools in Arlington County had been carefully planned and fostered by the NAACP for quite some time.

TAXABLE STATUS

The Committee was required by the Act creating it to conduct its investigations so as to collect information which shall be necessary or useful in:

> (1) determining the need, or lack of need, for legislation which would assist in the investigation of organizations, corporations, and associations which seek to influence, encourage, or promote litigation relating to racial activities in this State, relative to the State Income Tax laws;
>
> (2) determining the need, or lack of need, for legislation redefining the taxable status of such corporations, associations, organizations and other groups, and further defining the status of donations to such organizations or corporations from a taxation standpoint.

In pursuance of these directives, the Committee contacted the State Tax Commissioner in order to have his views along these lines. The State Tax Commissioner replied that there can be no doubt that organizations engaged in such activities are subject to local taxation on their real estate and tangible personal property to the extent that any such property owned by them may be located in Virginia.

He further replied as follows:

> "The Virginia income tax, however, is not imposed on any Corporation which is 'not organized or conducted for pecuniary profit.' (Code of Virginia § 58-128). No State income tax returns are required of any corporation of this class. Non-stock, non-dividend-paying corporations are usually classified as not organized or conducted for pecuniary profit.
>
> "Virginia no longer imposes any State property tax on intangible personal property except capital not otherwise taxed. (Code of Virginia, §§ 58-410–58-419). The capital tax has never been held to apply to corporations and associations other than business corporations and associations, and it is my view that we would have a hard time applying it to the organizations above mentioned.
>
> "A tax approach to the problems presented by the activities of the organizations above mentioned would not seem to me to be very promising. The reason is that in order to subject them to the income tax it would be necessary to broaden the income tax law so as to include not only them but also all other organizations having the same general legal classification."

The Committee also requested the State Corporation Commission to furnish it with information regarding the qualifications and payment of franchise taxes by such Corporations to do business in this State as Foreign Corporations, and as to any steps which had been taken or would be taken to enforce the penalties prescribed by statutes against such corporations for doing business in this State without having been previously properly qualified.

Counsel for the State Corporation Commission replied that it is not the policy of the Commission to inquire into the past activities of a foreign corporation in this State if it makes application for a certificate to do business, and

that no proceedings are pending before the Commission, or are contemplated, against such corporations for any acts in the State prior to their qualification.

As has been pointed out, both the National Association for the Advancement of Colored People, and NAACP Legal Defense and Educational Fund, Inc., New York Corporation, have been doing business in this State for many years, but neither Corporation qualified to do business in Virginia until 1956.

Although it appears that both of these Corporations were ostensibly incorporated as non-profit organizations, they have both received and expended very large sums of money in the State for purposes other than those usually considered as charitable, educational, or non-profit, in that the great bulk of the funds received and expended by them have been devoted to the purpose of instigating and maintaining litigation devoted to the ultimate integration of the races.

The Tax Department has informed the Committee that it has ruled that no donation or contribution to these organizations is deductible from the tax returns of those making such donations or contributions.

The Committee refrains from making any recommendations as to this phase of the matter.

[*Investigation of School Texts*]

Under Subsection 3 of Section 2 of Chapter 37 of the Acts of Assembly (1956 Special Session) an investigator was employed by the Committee Chairman to determine "the effect which integration or the threat of integration could have on the operation of the public schools in the State or the general welfare of the State . . ."

This inquiry was preliminary in nature and was initiated by the Chairman to determine whether or not there was sufficient information to refer to the full committee for action. The sole area of the inquiry was that relating to text books and reference books used in the public high schools in the 10th Congressional District.

Unfortunately this inquiry was not commenced until the last month of the Committee's work and no final determination can be made as to the facts nor is the Committee prepared to make a positive finding at this time. Sufficient information has come to the Committee's attention, however, to necessitate a recommendation that further study should be made by an appropriate agency of the State government.

SUMMARY AND RECOMMENDATIONS

The Committee believes as a result of the testimony which it adduced at its hearings: first, that the manner in which the NAACP Attorneys obtained their clients in the school integration cases is, in most cases, reprehensible, and, two, that the NAACP, the NAACP Legal Defense and Educational Fund, Inc., New York Corporations, and the Virginia State Conference of NAACP Branches, an unincorporated association, are now and have been engaged in the unauthorized practice of the law.

Consequently by a resolution unanimously adopted, the Committee decided to refer the information in its files to the attention of the various Committees of the Virginia State Bar and to specifically file a copy of the Committee's report with each of the said Committees. The Committee further resolved that the transcript of the evidence heard by this Committee and any other evidence in the Committee's files shall be made available to an appropriate representative of a Committee of the Virginia State Bar which seeks to take action in regard to any Attorney or any organization for any activities which have been investigated by this Committee.

By a resolution unanimously adopted at its final meeting in the State Capitol on October 29, 1957, the Committee recommended that a further study should be made of text and reference materials in the public school system of the Commonwealth of Virginia by an appropriate agency of the State Government. Consequently a resolution to this effect will be presented to the General Assembly by the Committee at its regular session.

By a further resolution unanimously adopted, the Committee recommends that the General Assembly of Virginia establish a joint Committee of the members of the House of Delegates and the Senate to continue the work which was commenced by this Committee and by the Committee on Offenses Against the Administration of Justice. This Committee feels that the power of the new Committee should be broadened generally. The new Committee should be given the authority to inquire into such matters as subversive activities generally and more specifically as they relate to the question of segregation or integration in the public schools. Consequently a bill to establish the new Committee will be presented to the next regular session of

the General Assembly by the members of this Committee.

By further resolution the Committee resolved that its files should be made available to any subsequent legislative investigating Committee of the General Assembly of Virginia dealing with matters related to this Committee's area of inquiry.

Respectfully submitted,

/S/ James M. Thomson
Chairman
/S/ Earl A. Fitzpatrick
Vice-Chairman
/S/ George S. Aldhizer II
Member
/S/ George E. Allen, Jr.
Member
/S/ Charles B. Cross, Jr.
Member
/S/ Mills E. Godwin, Jr.
Member
/S/ Frank P. Moncure
Member
/S/ H. H. Purcell
Member
/S/ R. M. Smith
Member
/S/ Landon R. Wyatt
Member
/S/ Leslie Hall
Chief Counsel

CONSTITUTIONAL LAW
Use of Troops—Florida

Senate Memorial No. 19X of the 1957 Florida legislature, filed October 29, 1957, memorializes the United States Congress to censure the President for the use of federal military forces in Little Rock, Arkansas and to prevent such use by controls over appropriations and other legislation.

SENATE MEMORIAL NO. 19-X

A memorial to the Congress of the United States to enact measures tending to cause the withdrawal of federal military forces from the occupation of Little Rock, Arkansas, and prevent the further intrusion by federal military troops on the constitutional rights of the sovereign states of the union, by withholding of appropriations and public funds from such troops while so engaged, thereby guaranteeing the sovereign states freedom from military rule as contemplated by the first four articles to the constitution.

WHEREAS, the Legislature of Florida, during the 1957 Legislative Session, through Senate Concurrent Resolution No. 72, unequivocally expressed a firm and determined resolution to maintain and defend the Constitution of the United States against every attempt, whether foreign or domestic, to undermine and destroy the fundamental principles, embodied in our basic law, by which the liberty of the people and the sovereignty of the states, in their proper spheres, have long been protected and assured, and

WHEREAS, the Legislature of Florida doth hereby express a firm belief that the recent action of the President of the United States, in inflicting military rule upon the sovereign state of Arkansas, is a far more serious threat to the security of the Nation and our constitutional form of government than any possible threat from abroad, and

WHEREAS, the Legislature of Florida lately did explicitly and peremptorily assert that it viewed the powers of the federal government as resulting solely from the compact to which the states are parties, as limited by the plain sense and intention of the instrument creating that compact, which compact carefully expressed the limited powers of the President of the United States, and

WHEREAS, the Legislature of Florida did assert most clearly that the powers of the federal government, including those of the President, are valid only to the extent that such powers have been enumerated in the compact to which the various states assented originally and to which the states have assented in subsequent amendments validly adopted and ratified, and

WHEREAS, the Legislature of Florida did consider that the very nature of this basic compact, apparent upon its face, is that the ratifying states, parties thereto, have agreed voluntarily to surrender certain of their sovereign rights, but only certain of these sovereign rights, to a federal government thus constituted; and that all powers not delegated to the United States, including the President thereof, by the Constitution, or prohibited by it to the states, have been reserved to the states, respectively, or to the people, and

WHEREAS, the several sovereign states have at no time surrendered to the federal government their right under the Tenth Amendment to the Constitution to exercise their discretion in the regulation of matters of strictly local concern, and

WHEREAS, the sovereign states, in ratifying the Fourteenth Amendment to the Constitution, did not agree that the power to regulate matters of local concern be prohibited to them thereby, and

WHEREAS, the Legislature of Florida emphatically denies that the President of the United States had the right which he asserted recently to peremptorily use federal troops in the sovereign state of Arkansas to compel the enforcement of a questionable judicial edict requiring the enforced integration of the public schools therein, and

WHEREAS, the threats and coercive measures of the federal military troops occupying the sovereign state of Arkansas constitute a deliberate, palpable, and dangerous attempt by the President and the federal government to prohibit to the states certain rights and powers never surrendered by them, and

WHEREAS, the President of the United States, without the request, consent, and in the absence of the Governor, ordered federal troops to occupy a portion of the sovereign state of Arkansas, and such troops through the exercise of brute force and with the high-handed tactics reminiscent of Hitler's storm troopers declared their intention to rule the citizenry therein, and thereby proceeded to maliciously and unnecessarily enjoin the inherent and inalienable rights and powers of the citizens thereof, and

WHEREAS, the immediate military leader of such troops, arrogantly and with impunity and with the implied acquiescence of the President of the United States, entered the public schools of Arkansas and thrust his views upon the minds of the children therein, thereby indelibly impressing upon the minds and hearts of such children the imprint of Fascism and military arrogance, and

WHEREAS, the President of the United States, in ordering federal military troops to occupy Little Rock, Arkansas, cited as authority for such act a clearly unconstitutional law which was created by a vengeful Reconstruction Congress to give dictatorial powers to the President of the United States, and

WHEREAS, even if such law were constitutional its provisions were improperly invoked by the President in that no federal law was being breached, and

WHEREAS, the federal military forces occupying Little Rock, Arkansas, under the express order of the President of the United States are not in nature or fact a *posse comitatus* authorized by federal law to assist a federal marshal in enforcement of a federal law, and

WHEREAS, the President was without authority and jurisdiction to invoke federal military rule in the sovereign state of Arkansas because (1) the Governor of Arkansas did not provide the requisite request for military assistance, (2) a state of insurrection, rebellion, or need to repel an invasion, did not exist, (3) no federal law existed upon which a violation was predicated, and

WHEREAS, if the President of the United States had had jurisdiction and authority to invoke federal military rule in the sovereign state of Arkansas, he was powerless to interfere with the operation of the public schools therein because the Constitution of the United States does not confer upon the President, or the federal government, any power or authority over such schools or over the subject of education, jurisdiction over these matters being reserved to the states, nor did the states by the Fourteenth Amendment authorize any interference on the part of the President or any other department of the federal government with the operation by the states of such public schools as they might in their discretion see fit to establish and operate, and

WHEREAS, the President of the United States, by his recent action invoking military rule in the sovereign state of Arkansas, announced his power to adjudge state laws ineffectual and inoperative on the basis of his opinion of such laws as tested by the existing climate of political expediency, and

WHEREAS, the President of the United States, by federalizing the State Militia of Arkansas, rendered the Governor thereof powerless to employ such agency of state government for the protection of the inhabitants thereof should an emergency arise within the State requiring their use, and

WHEREAS, if the President of the United States is permitted to exercise the power to determine the method of enforcing a federal decree, and thereby to invoke military rule because of the inconvenience attendant in the proper use of constitutional processes, the states will have been destroyed; and the indestructible union of indestructible states established by the Constitution of the United States will have ceased to exist, and in its stead the President will have created, without jurisdiction or authority from the people, a dictator form of government, possessing total, unrestricted power, and

WHEREAS, it is clear that the President of the United States has deliberately resolved to disobey the Constitution of the United States and to flout and defy the supreme law of the land. The duty and responsibility of protecting life, property and the priceless possession of freedom rests with each government of each individual state of the union, as to all those within their respective territorial limits. The state alone has this responsibility, and

WHEREAS, is is clearly evident to the Legislature of Florida that the President of the United States, by his action, in the sovereign state of Arkansas, and his general intent as inadvertently disclosed by the Pentagon to occupy southern states with military forces, is deserving of the censure of the Congress, and

WHEREAS, the Legislature of Florida asserts that whenever the President of the United States engages in the deliberate, palpable and dangerous exercise of powers not granted to him, the states who are parties to the compact have the right to expect and require that the Congress of the United States exercise the powers granted by the compact to arrest the progress of the evil, and maintain the constitutional guarantees of the several sovereign states under the Tenth Amendment to the United States Constitution, and

WHEREAS, a failure on the part of the Congress thus to assert its authority in this regard would be construed as acquiescence in the surrender therof; and that such submissive acquiescence to the seizure of one right by the President would in the end lead to the surrender of all rights, and inevitably to the consolidation of all functions of government under one separate dictatorial head, contrary to the sacred compact by which this Union of States was created, NOW, THEREFORE,

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

That the Congress of the United States be and it is hereby requested to:

(1) withhold all funds and appropriations from any federal military forces directed to occupy any sovereign state without the express approval of the governor therein, and

(2) enact legislation designed to assure the several sovereign states freedom from federal military control, and

(3) enact an appropriate measure censuring the President of the United States for his deliberate interference with the constitutional guarantees of the citizens of Little Rock, Arkansas, and admonishing the President to recognize the Congress of the United States as the legally proper branch of the government charged with the responsibility of furnishing direction in matters relating to civil rights as contemplated by the language of Section 2 of the Fourteenth Amendment that "The Congress shall have power to enforce this article by appropriate legislation."

BE IT FURTHER RESOLVED, that copies of this Memorial be dispatched to the President of the United States, to the President of the United States Senate; to the Speaker of the United States House of Representatives; and to each of the congressional delegation in the United States Congress.

Filed in Office of Secretary of State October 29, 1957.

ADMINISTRATIVE AGENCIES

EDUCATION
Public Schools—Oklahoma

The Board of Education of the El Reno, Oklahoma, school district has issued a resolution concerning racial admission policies at the El Reno Junior College and the public schools in the district. The policy permits but does not compel attendance at public schools on the basis of geographical proximity of residence without regard to race or color.

RESOLUTION NO. 121
of the
BOARD OF EDUCATION
EL RENO SCHOOL DISTRICT NO. 34
CANADIAN COUNTY, OKLAHOMA

WHEREAS, the United States Supreme Court has duly decreed that racial segregation in the public schools of the several states is in violation of provisions of the Federal Constitution; and

WHEREAS, the Board of Education of the State of Oklahoma has formulated policies for the implementation of the decree of the Supreme Court by authorizing and requiring the ending of public school racial segregation at the earliest practicable date; and

WHEREAS, the Board of Education of School District No. 34, Canadian County, Oklahoma, is bound by the oath of office to which each member subscribes, to comply with the laws, edicts, decrees and orders of the State of Oklahoma, of which said School District is a political subdivision, deriving its authority and powers from the State of Oklahoma, which is in turn limited by decrees of the Supreme Court of the United States of America:

BE IT THEREFORE RESOLVED by the Board of Education of El Reno, School District No. 34, Canadian County, Oklahoma, that racial segregation in the public schools under its authority be terminated as of this date, in keeping with the laws of the State of Oklahoma and the policies of the State Board of Education; and

BE IT FURTHER RESOLVED, in conformity with the text of this resolution, that the following policies be adopted effective immediately:

1. The El Reno Junior College be open to all qualified applicants for admission upon payment of the regular tuition and fees required of all students.

2. All children in grades one to twelve inclusive be required to attend the school nearest their place of residence by a regularly-traveled road or street, provided that pupils who have in previous years attended a school other than the school nearest their place of residence be permitted to continue in the school they have previously attended, during the school year 1956-57. (Amended to include school year 1957-58).

3. Pupils entering any elementary or secondary school for the first time in 1956-57 may attend the school commonly attended by the other pupils in the area or section of the district in which they reside. (Amended to include school year 1957-58).

4. Previously established boundary lines among the elementary schools of the district for purposes of balancing attendance will not be affected by this resolution.

5. Transfers from one attendance area to another will be authorized by the superintendent of schools if such transfer, in his judgment, will serve the best interests of the pupil and of the school system as a whole.

AND BE IT FINALLY RESOLVED that further consideration will be given by this Board of Education to any and all unforeseen problems that may develop as a result of the adoption of this resolution and within its framework.

EDUCATION
Colleges and Universities—Tennessee

The Tennessee State Board of Education, which controls a number of the institutions of higher education in the state, on November 8, 1957, issued a resolution authorizing the admission of all qualified applicants who meet the entrance requirements of the respective colleges and universities, effective in the fall of 1958. The resolution provides for limitation of enrollment through the institution of "selective devices," provided that such devices apply equally to all prospective students.

Whereas, the Eightieth General Assembly of the state of Tennessee enacted Public Chapter 211, Public Acts of 1957, which authorizes and empowers the state board of education to prescribe rules, regulations, and requirements for admission to colleges and universities under its control; and

Whereas, the state board of education has not implemented the permissive legislation of the Eightieth General Assembly as of this state; and

Whereas, the Eightieth General Assembly, representing the people of Tennessee, evidently believed that the state board of education should review the admission policies at the colleges and universities under its control or it would not have enacted Public Chapter 211, Public Acts of 1957; and

Whereas, research, surveys, studies and reports indicate that many of our institutions of higher learning are becoming crowded and that in the years ahead they will become more crowded, and that students not qualified to do an acceptable quality of college work may be enrolling in our colleges and universities; and

Whereas, it is the desire of the state board of education to maintain reasonable quality standards; and

Whereas, the staff, the physical plant, and the enrollment vary greatly from institution to institution in the colleges and universities under the control of the state board of education; and

Whereas, a special committee of the board met with the college presidents on Sept. 16 and Oct. 21, 1957; and

Whereas, the presidents' council has submitted recommendations concerning the admission of high school graduates, transfers, special students, graduate students, and probationary students; and

Whereas, said recommendations have today been approved by this board upon the recommendations of said special committee; and

Whereas, it will require some time for said colleges and universities to publish said policies in their catalogues and to work out the details necessary for administration of these policies; therefore,

Be it resolved, that when and if the capacity of any college is reached because of limited building facilities, finances, and other reasonable circumstances as determined by the college administration, the enrollment of said college shall be limited by selective devices recommended by said college administration and approved by the board, provided that said devices shall apply equally to all prospective students; and

Be it further resolved, that the state board of education shall authorize the admission of all qualified applicants who meet the entrance requirements of the respective colleges, and universities, effective at the beginning of the fall term, 1958.

EMPLOYMENT
Labor Relations—Federal Statutes

WESTINGHOUSE ELECTRIC CORP. (Meter Plant) Raleigh, North Carolina, Employer; INTERNATIONAL UNION OF ELECTRICAL RADIO AND MACHINE WORKERS, AFL-CIO, Petitioner.

National Labor Relations Board, October 24, 1957, Case No. 11-RC-901, 119 NLRB No. 26.

SUMMARY: A consent election to determine certification of a union to represent employees of a Westinghouse Electric Corp. plant in North Carolina was held under the provisions of

the National Labor Relations Act. The International Union of Electrical Radio and Machine Workers, which had sought certification, was unsuccessful in the election and filed objections to conduct affecting the results of the election. The IUE maintained, among other contentions, that the employer used racial prejudices to influence employees against the union. The NLRB Regional Director recommended that the IUE's objections be overruled. The Board considered the petitioning union's exceptions but found them to be without merit and certified the results of the election. 118 NLRB No. 42 (June 26, 1957). The IUE then petitioned for reconsideration. The Board, two members dissenting, denied the motion for reconsideration. The Union's Motion for Reconsideration and the Board's order denying the Motion are set out, together with a concurring opinion of the Board Chairman and two dissenting opinions.

Motion for Reconsideration

This is a Motion for Reconsideration of the decision of the Board in the above matter, dated June 26, 1957, dismissing the exceptions of the Petitioner to the Report of the Regional Director, and certifying the results of an election.

Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted on December 14, 1956, among the production and maintenance employees at the Raleigh, North Carolina plant of the Westinghouse Electric Corporation, to determine if they wished to have the Petitioner as their bargaining agent. The Petitioner failed to obtain a majority of the ballots cast.

On December 21, 1956, the Petitioner filed timely objections to conduct affecting results of the election. Among the objections filed by the Petitioner was one to the effect that the conduct of the Employer had inflamed the racial prejudices of the employees in the unit so as to make it impossible to conduct a free and fair election. A summary of the statements filed in support of this objection is set forth below.

The Regional Director recommended that this objection, along with all others filed by the Petitioner, be overruled. Exceptions to the Regional Director's report were timely filed. In its decision of June 26, 1957, the Board, acting through a panel, upheld the action of the Regional Director, with respect to the issue of racial prejudice, for the "reasons detailed in his Report".

The Petitioner urges the Board to consider its decision on the ground that the Regional Director and the Board failed to consider certain evidence submitted by the Petitioner, and grossly and erroneously misinterpreted other evidence submitted by the Petitioner, relating to the issue of whether the inflammation of racial prejudice during the period immediately preceding a Board election constitutes conduct which prevents the holding of a free and fair election under the National Labor Relations Act. The Petitioner urges, further, that neither the Regional Director nor the Board appear to have considered the question of whether the injection of racial antagonism and prejudices into an election campaign is a ground for setting aside a Board election.

The Petitioner submits that the importance of this issue is so great that the full Board should reconsider the action of its panel, and, upon reconsideration, should direct that a hearing be held on the objections filed by the Petitioner.

Summary of Facts

The plant at which the election took place is located in Raleigh, North Carolina—an area where racial tensions are easily aroused. The plant has practiced racial segregation and discrimination since its operations began. Negro workers are confined to a few menial maintenance jobs, and there are separate drinking, eating and toilet facilities for the employees of each race. It is against this background, a background well known to the Regional Director and to his agents, that the Employer's actions must be judged and evaluated.

At a series of captive audience meetings held by the Employer on the days immediately preceding the election, Plant Manager Babcock himself injected the inflammatory issue of race relations into the election campaign. Signed statements from employees who attended these meetings were submitted to the Regional Director, and attest to the manager's conduct. Babcock stated at one meeting that "if the union won,

colored people working in maintenance would get job promotions instead of the white people". At another meeting Babcock displayed a cellophane-covered folder containing pictures of Negro and white employees working side by side, and told the employees that the photograph "proved how fond unions like IUE are of negro employees". At another meeting, an employee asked whether it was true that if the Union won the election Negroes would displace white employees, and Babcock replied that the Union "could do anything". At still other meetings, Babcock showed photographs of Negro and white workers working side by side, or Negro workers working alongside white union officials. All of these statements of the plant manager are false, particularly in the context in which they were made, inasmuch as they assert IUE pursues a policy of discriminating against whites in favor of Negroes.

Discussion

The only discussion in the Regional Director's Report of the statements concerning Plant Manager Babcock's conduct is as follows:

> "Evidence was presented that when the question of integration was raised during the December 11 and 12 meetings, Plant Manager Babcock told the employees that if the Union won the election promotions would be by seniority regardless of color. According to Babcock, he answered these questions by displaying articles appearing in various issues of IUE-CIO and CIO News. These articles were to the effect that the Union and the CIO supported civil rights education and legislation."

Although the Board appears to accept the Regional Director's analysis, it is difficult to believe that it gave adequate consideration to the issues raised.

Petitioner submits that the Regional Director failed to give any consideration to the context in which the actions of the Employer's plant manager were conducted. It is apparent that the Regional Director examined the remarks of the plant manager completely detached from the situation in which they were made, and literally closed his eyes to the probable consequences of those statements. If the consequence of a cry of "fire" were to be considered entirely apart from the fact of whether it was made in a vast empty desert, or in a crowded theater, we would have a situation comparable to the present one. The Regional Director has failed to consider whether the language of the plant manager, under the circumstances, was highly inflammable and prejudicial.

The Regional Director's Report fails to point out that it was the plant manager who initiated the discussions with regard to race, in a captive audience of the employees in the unit. Consequently, to say merely that "when the question of integration was raised in the December 11 and 12 meetings", Babcock made certain remarks, obscures the Employer's animus in the matter. The question was not casually or accidentally raised. The plant manager was prepared with articles and photographs relating to the race issue.

[*Statement Not Analyzed*]

The statement of the plant manager that "if the union won the election promotions would be made by seniority regardless of color," is not analyzed or evaluated by the Regional Director in any way. But this statement goes to the very heart of the discriminatory practices which are maintained at the plant. Color does affect promotions; color does determine job placement. The significance of this statement is that the plant manager was telling the employees that if the Union won the election all of the employees would be represented without discrimination. He was telling them, in effect, that if the Union won the election it would conduct itself according to law, because the law requires that a union represent the employees in a unit without regard to color.

The Regional Director accepts the statement of the plant manager that he answered these questions by displaying articles appearing in various issues of the IUE-CIO and CIO News, which articles were to the effect that the Union and the CIO supported civil rights education and legislation. The Regional Director has not specifically commented on these statements, and fails to give any consideration to their inflammatory effect in a community where segregation in education and civil rights legislation are highly provocative subjects.

The Regional Director ignores evidence that the plant manager had warned that if the Union won the election "colored people working in maintenance would get the job promotions in-

stead of the white people". That is clearly a threat of loss to the white employees. The plant manager's statement was not qualified in any way. It was simply a bald threat of a serious detriment to white employees if the Union won the election.

The Regional Director ignored the plant manager's display of photographs of Negro and white workers working side by side with the statement that the photograph "proved how fond unions like IUE are of negro employees". What possible relevance can such statements have except that the plant manager sought thereby to inflame the racial prejudice of the employee! But the Regional Director ignored this evidence.

The Regional Director gave no consideration to evidence that the plant manager said that if the Union won the election "The Union can do anything" in answer to a question whether Negroes would replace whites.

[*Creates Dilemma*]

The Regional Director's cavalier treatment of the evidence creats a dilemma for the Board. If the Regional Director accepted the plant manager's version of events rather than that of the Union, there is presented a substantial issue of fact which requires a hearing. If, on the other hand, the Regional Director simply omitted the additional facts set forth above, these omissions are sufficiently substantial to warrant difference in the Board's decision.

Construing the Employer's pre-election statements as the average employee in the plant would, they meant:

(1) The Employer discriminates against Negroes in employment, job assignments and other working conditions.
(2) The Union favors Negroes over whites in respect to these matters.
(3) If the Union should be certified, the Employer's policy of discrimination against Negroes would be abandoned and the Union's alleged policy of discrimination in favor of Negroes would be placed into effect in the plant, with the Employer's consent or acquiescence.

These are threats of retaliation which unquestionably influenced the outcome of the election and transcended the bounds of permissible propaganda.

The Regional Director stated the foregoing statements of the plant manager constituted expression of views and opinions privileged by Section 8 (c) of the Act. As stated, the statements were threats rather than propaganda. Even if the contrary were true, this does not preclude setting aside the election. It is settled Board policy that elections may be set aside because of conduct which prevents a free election, even though Section 8 (c) of the Act insulates the party responsible for such conduct from unfair labor practice charges. NLRB v. Bar-Brooke Manufacturing Co., Inc. 220 F.2d 832 (CA 5); Aeronca Manufacturing Corp., 118 NLRB No. 57.

The Board has held in a number of cases that elections may be set aside where there has been propaganda which lowers the standards of election campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election. NLRB v. Trinity Steel Co., 214 F.2d 120; Calidyne Co., 117 NLRB No. 145; Reiss Associates, 116 NLRB 217, Gummed Products Co., 112 NLRB 1092; United Aircraft Corp., 103 NLRB 102. The theory of these cases is set forth as follows in the United Aircraft case, in which one of the unions distributed a telegram falsely alleged to have been written by the president of the opposing union:

> "Although the Board has traditionally declared its intention not to censor or police preelection propaganda by parties to elections, it has imposed some limits on free campaigning which, when transgressed, require corrective action. Thus, exaggerations, inaccuracies, partial truths, name calling, and falsehoods, while not condoned, may be excused as legitimate propaganda, provided they are not 'so misleading' as to prevent the exercise of free choice by employees in the selection of their bargaining representative. Propaganda of this sort, the Board has said, will not be censored or policed if it remains within 'bounds', and in this connection the question to be decided is 'one of degree'. In sum, the ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election."

The Board also declared in this case that:

> "The conclusion is impelled that the UAW by its deliberate deception as to the source of the 'telegram' so blinded the employees to the significance of its contents that they could neither recognize it as a fake nor evaluate it as propaganda. This conduct lowered the standards of campaigning to a level which impaired the free and informed atmosphere requisite to an untrammeled expression of choice by the employees."

We submit that the falsehoods, distortions and exaggerations contained in the Employer's statements in this case were far more calculated to blind the employees and to obscure their judgments. It must be borne in mind that we are confronted here not merely with misstatements of fact which can be corrected, at least substantially, if adequate time is available. The misstatements involved in this case were deliberately designed to provoke passions and prejudices, emotions which cannot be counteracted by simple denials. Extensive educational campaigns are required to meet Big Lies of this kind. It should be noted, furthermore, that some of the misstatements made by the plant manager relate to matters peculiarly within his own knowledge, and could not be successfully repudiated by the Petitioner. For example, when he declared that if the Petitioner won, Negroes would be preferred over whites in promotions, etc., he was making a declaration as to what the Employer would do. Obviously no such preference could take place unless the Employer acquiesced in it. Consequently, no countermeasures taken by the Petitioner could have enabled the employees properly to evaluate the propaganda issued by the Employer. In our view, the conduct of the Employer in this case did, to a greater extent than in the cited cases, lower the standards of campaigning to a level which impaired the free and informed atmosphere requisite to an untrammeled expression of choice by the employees. We doubt that there are any types of misstatements more likely to interfere with the laboratory conditions necessary to a fair election (P. D. Gwaltney & Co., Inc., 74 NLRB 371; General Shoe Corp., 77 NLRB 124; Falmouth Co., 114 NLRB 897) than misstatements calculated to incite the passions associated with racial prejudice.

The Board has held that a certified bargaining agent cannot discriminate in representing employees on the basis of race. Larus & Brothers, 62 NLRB 1075. In Veneer Products, Inc., 81 NLRB 492, the Board declared that if "equal representation has been denied to any employee in the unit because of his color, the Board will consider rescinding any certification it may issue."

Surely if the Board is concerned with preserving the integrity of its own processes, it will not permit an employer to profit by conduct which flouts a federal policy of non-discrimination. That is precisely what would happen here if the Board refused to allow a hearing to the Petitioner to demonstrate by sworn testimony what now appears in its uncontradicted statements.

[*Obligation of Agents*]

In an impressive series of cases the Supreme Court of the United States has held that collective bargaining agents have a legal obligation to represent employees in bargaining units without discrimination, and contracts which fail to observe this principle may be set aside.

More than a decade ago, the Court decided that a union which is given exclusive bargaining authority by virtue of a federal statute cannot enter into a collective bargaining contract with an employer which has the effect of discriminating on racial grounds, against persons in the bargaining unit, and such a contract will be set aside. Steele v. Louisville & Nashville Railroad, 323 U.S. 192; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210. These cases arose under the Railway Labor Act, but the Court indicated that the federal status of exclusive bargaining agent was the determining factor. In the Steele case, the Court cited J. I. Case v. NLRB, 321 U.S. 332, as authority for the proposition that the collective bargaining agreement is the only contract that has application to the employees in these circumstances, and "It's benefits and advantages are open to every employee of the represented unit."

Later, the Court reaffirmed the proposition that the exclusive status of a bargaining agent makes fairness essential, and that a discriminatory contract between employers and exclusive bargaining agents may be set aside by the courts and its enforcement enjoined. Graham v. Brotherhood of Railway Trainmen, 338 U.S. 232; Brotherhood of Railway Trainmen v. Howard, 343 U.S. 768.

The applicability of this rule of law to bargaining agents certified by the National Labor Relations Board was settled beyond question in 1955 in Syres v. Oil Workers International Union, 350 U.S. 892. In that case, a union certified by the NLRB entered into a collective bargaining agreement with an employer which had the effect of effectively preventing Negro employees from receiving promotions. The suit was brought to enjoin the enforcement of the contract. Both the District and Circuit Courts refused to entertain the suit, stating that the Negro members of the union should pursue internal remedies in the union or should sue the local for making a pledge not to enter into a discriminatory contract. The Supreme Court relying on the Steele case, reversed the lower courts summarily.

Certainly the Board should set aside an election won by a union which campaigns on a platform of discriminatory representation for one of two races in the bargaining unit. By the same token, the Board should not permit an employer to wage a campaign against a union by attributing to it such an intent to discriminate. If a union is to be precluded from making such a plea for votes, the employer should likewise be disabled from advancing it. The necessity for preserving the integrity and fairness of the federal representation election process demands no less.

In the light of this clearly expressed policy, and in the light of applicable principles established by the Board, Petitioner urges the Board to recognize that deliberate provocation of racial prejudice in an election campaign prevents a free choice of a collective bargaining agent. Inasmuch as the evidence presented by the Petitioner, showing deliberate inflammation of racial prejudice by the Employer, was not contradicted and was not discredited, it is incumbent upon the Board to hold a hearing so that this issue may be fully explored.

Conclusion

The Petitioner urges the Board to reconsider, and set aside, its Decision of June 26, 1957, in this case, and direct that a hearing be held on the Petitioner's Objections to the Election.

Respectfully submitted,
Benjamin C. Sigal
General Counsel
International Union of Electrical
Radio and Machine Workers,
AFL-CIO

July 15, 1957

Order Denying Motion

Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted on December 14, 1956, among certain employees at the Employer's Raleigh, North Carolina, plant. At the conclusion of the election, the parties were furnished a Tally of Ballots which showed that the Petitioner failed to obtain a majority of the ballots cast. On December 21, 1956, the Petitioner filed objections to conduct affecting the results of the election and on March 7, 1957, the Regional Director issued his Report on Objections in which he found that the Petitioner's objections did not raise substantial or material issues with respect to the conduct of the election, or conduct affecting the results of the election, and recommended that the objections be overruled. On March 18, 1957, the Petitioner filed exceptions thereto. On June 26, 1957, the Board issued a Decision and Certification of Results of Election.[1] On July 17, 1957, the Petitioner filed a Motion for Reconsideration of the aforesaid decision in which it urged the Board to reconsider, and set aside, its Decision of June 26, 1957, and direct that a hearing be held on the Petitioner's Objections to the Election.

The Board has duly considered the matter and concluded that the motion for reconsideration in effect constitutes an additional objection to the election which was not filed timely under the Board's rules; accordingly,

1. 118 NLRB No. 42.

IT IS HEREBY ORDERED that the Motion for Reconsideration be, and it hereby is, denied.

Dated, Washington, D. C., October 24, 1957.

By direction of the Board.[2]

Frank M. Kleiler
Executive Secretary

CONCURRING OPINION

BOYD LEEDOM, CHAIRMAN, concurring:

Like Members Rodgers and Jenkins I would sustain the Regional Director and dismiss the petition. However, aside from the question of whether the exceptions raise matters properly before us for decision, I feel impelled because of my concern over the impact of statements of this character on the election process, to register my views.

A threat or promise with racial overtones, i.e., one which threatens a loss of jobs because of racial distinctions, made for the purpose of influencing employees in their right to choose a bargaining representative, is clearly prohibited by the Act and would constitute grounds for setting an election aside. Whether or not the racial overtone is present, there exists a threat or promise keyed to union activity which is not protected by Section 8 (c). The more subtle problem, however, arises when the reference to job retention or job loss is tied to the fact that the union has a policy, at odds with that of the employer, which calls for disregarding racial lines in the allocation of jobs, the implication being that, if the union wins the election, union policy will probably prevail thereafter in the plant. It is true that the Board has heretofore found that statements endeavoring to forecast what will eventuate because of union demands and union practices are predictions which fall within the protection of the Act, and I have subscribed to that approach. However, I have serious doubts whether that principle should be applied in a case where the prediction involves an advantage or disadvantage to an employee growing out of racial prejudice. The consequence of injecting the racial issue where racial prejudices are likely to exist, is to pit race against race and thereby distort a clear expression of choice on the issue of unionism. Clearly, to draw the issue along these lines does not effectuate the policies of the Act. The implications are far greater, in my opinion, than the reaches of the Act, for they bespeak an assault upon the spirit of our constitution.

Dated, Washington, D. C., October 24, 1957.

DISSENTING OPINIONS

MEMBER BEAN, dissenting:

I joined in the Panel decision overruling the Union's objections to the election held in this case. The Union has moved for reconsideration of that decision. On reappraisal of the questions raised at the time of that decision, I now believe that the Board should order a hearing to ascertain whether the Employer's officials in fact engaged in conduct which prevented a free and untrammeled expression of choice by the employees.

Among the objections which the Union first urged as reasons for setting aside the election was the allegation that the Employer had showed moving pictures to its employees "in order to inflame racial prejudice against the IUE". The Regional Director conducted an investigation of all the objections. He reported there was evidence that Babcock (the plant manager) told employees if the Union won the election promotions would be made by seniority regardless of color and displayed news articles to the effect that the Union and the C.I.O. supported civil rights education and legislation.

The Union filed ten enumerated Exceptions to the Regional Director's Report. Two of them are expressly directed to the Regional Director's failure to recommend that Babcock's injection of the "inflammatory racial issue" into the preelection campaign improperly influenced the outcome of the voting. Again in aid of its insistence that the election did not take place in a free environment, the Union averred—in its supporting papers—that (1) company officials told the assembled employees that "white employees would be discriminated against" if the Union won; (2) the Employer showed pictures of white and colored employees working together and "coupled this demonstration with the prediction that Petitioner would cause similar practices in the North Carolina plant"; and (3) the plant manager himself raised the racial issue when he called the employees together and made "the implied promise that if the Petitioner was rejected by the employees the then current racial segregation practice would be retained."

It is thus clear that both the fact of the Em-

2. Board Members Murdock and Bean dissent; their opinions are attached hereto. Chairman Leedom concurs with an opinion also attached hereto.

ployer's statements and conduct relating to racial prejudice as well as its effect upon the Board's election processes were put in issue by the timely Objections and Exceptions.[3] The conduct which the Union alleges that the Employer engaged in and the tenor of the Regional Director's report as to what occurred are in substantial accord. Indeed, some of the statements attributed to the plant manager appear to be implicit in the conclusionary language appearing in the field investigation report.

[*Factual Issues Unresolved*]

Certainly there is here presented a factual issue as yet unresolved, and that is whether or not Babcock's statements intended to influence employees in the selection of their collective bargaining agent, may be said to have constituted (1) promises, if the Union should lose, of continued discriminatory benefits to employees because of their color, and, conversely, (2) threats to white employees of loss of favorable and disparate treatment if the Union should win.

The Board as the agency entrusted by Congress to protect the right of employees to select their own bargaining agent can do no less than ascertain all of the facts, not by the unsworn and self-serving statements of the parties involved but by an appropriate hearing and the taking of testimony under oath. Such investigation having for its purpose the ascertainment of truth, becomes the more necessary under the circumstances here involved because words otherwise plain and innocuous in one setting may take on a vastly different meaning when interpreted in the light of the background of their expression.

It should be borne in mind that this is not an adversary proceeding under Section 10 of the Act, which must be conducted in accordance with applicable court rules relating to pleadings, evidence and civil procedure. This is, rather, an administrative investigation which the Board is required to make under Section 9 upon objections to conduct affecting the results of an election. An inquiry into the validity of such objections is not circumscribed by technical limitations devised for narrowing issues in unfair labor practice complaints.

[*Questions To Be Determined*]

Our primary responsibility is to guarantee to all employees, upon appropriate petition, a Board-conducted election completely free from improper interference with their statutory right to make their own untrammeled decision to choose or reject a collective bargaining representative. With this cardinal obligation in mind, a careful review of the papers now before us reveals three incompletely developed aspects of the situation surrounding this election which I believe, in the proper exercise of the Board's investigatory function, it is incumbent upon us further to explore.

(1) Did the Employer promise the continuation of a discriminatory advantage, or favored treatment to one class of employees over another in return for votes against the Union? If it did, such conduct obviously requires that the results of the election be set aside.

(2) Did the Employer either directly or by innuendo tell employees that if the Union lost the election it would persist in its practices of denying Negro employees the equality of opportunity of advancement in employment enjoyed by white employees? It had been my hope that we unanimously would seek the answer to this question in order that, if in the affirmative, we could then say whether or not this company's promise to discriminate in employment on the basis of color in the event of the favorable outcome of an election, is reason for setting aside such election.

(3) Did the Employer deliberately attempt to provoke and inflame the employees to racial prejudice as a technique for clouding the issue of the imminent election? In matters of this kind, where at best reasonability has but a precarious foothold, broad, positive assertions, such as appear in the Union's supporting papers, come easy. It may well be that the situation has been distorted. Only the test of formal hearing and

3. The members of the majority deny the Union's Motion for Reconsideration on ground that "constitutes an additional objection to the election," thereby implying that these matters are raised for the first time in the Motion. However, the Motion merely restates the same facts asserted in the original criticism of the Regional Director's investigation report. Originally, the Union said that Babcock promised if the Union lost, the existing racial segregation practice would be retained. Now it tells us that the Regional Director is in possession of employee affidavits quoting Babcock as saying "if the Union won, colored people working in maintenance would get the job promotions instead of the white people." There is no substantial difference between these two quotations, and I therefore cannot agree that the appeals to racial prejudice were never in issue in this case before the present Motion was filed.

the safeguards incident to sworn testimony and cross-examination can separate fact from emotional argument. Yet, should it clearly appear that Babcock "inflamed the employees to racial prejudice against the IUE", I feel we should not evade the responsibility of deciding whether the resultant balloting reflected the considered judgment of the workmen themselves.

According, I would grant the Union's Motion for Reconsideration, set aside the earlier panel decision, and direct a hearing before a Trial Examiner upon the objections to the election.

Dated, Washington, D. C., October 24, 1957.

* * *

ABE MURDOCK, MEMBER, dissenting:

I join in Member Bean's excellent dissenting opinion. In so doing I should point out that I was not a member of the panel which issued the Decision and Certification of Results of Election and that I am now passing for the first time on the issue raised by the objections to the election as a result of the referral of the Union's Motion for Reconsideration to the Full Board. I would further note that page 2 of the Union's Exceptions to the Regional Director's Report on Objections detail a specific threat of discharge by Plant Manager Babcock and numerous instances of interrogation by named foremen which fall within the Union's objections and which are not treated in the Regional Director's Report except to the extent that he dismisses a threat attributed to Foreman Lothian on one of these occasions, on which there is a credibility issue, as isolated. I believe that a hearing should encompass all interrogation and threats.

Dated, Washington, D. C., October 24, 1957

EMPLOYMENT
Government Contracts—Federal

The Fourth Annual Report on Equal Job Opportunity, by the President's Committee on Government Contracts was issued on November 19, 1957. Executive Orders 10479, August 13, 1953 (18 F.R. 4899) and 10557, September 3, 1954 (19 F.R. 5655), included as appendices to the report, are omitted in the reproduction of the report below.

Letter of Transmittal

November 19, 1957

MR. PRESIDENT:

Your Committee on Government Contracts submits the fourth annual report of its activities, covering the period from July 1, 1956, through June 30, 1957, as required by Executive Order 10479 of August 13, 1953.

The Committee again is able to report progress in executing your policy that all persons employed or seeking employment on work done under Government contract shall have equal economic opportunity.

Respectfully submitted.

Daniel C. Gainey	Helen Rogers Reid
Fred Lazarus, Jr.	Walter P. Reuther
Perkins McGuire	William P. Rogers
George B. McKibbin	John A. Roosevelt
George Meany	Cornelius E. Ryan
George T. Moore	Harry S. Traynor
James M. Nabrit, Jr.	Ivan L. Willis

James P. Mitchell, *Vice Chairman*

Richard Nixon, *Chairman*

Introduction

The President's Committee on Government Contracts during the last year strengthened and extended its efforts to eliminate discrimination because of race, religion, color, and national origin in employment on work done under Government contract.

A compliance review program was developed to provide the Committee with detailed knowledge of the employment practices of hundreds of the Government's more important contractors, to give a basis for measuring future progress, and to enable it to initiate action to correct discriminatory situations without the filing of specific complaints.

The Committee asked the contracting agencies of the Federal Government to take a firmer approach with contractors in situations where education, conciliation, mediation, and persuasion have not produced the desired results.

A conference was held to encourage maximum education and training of the youth of minority groups in order that these young people may be qualified for skilled jobs.

A regional office was established in Chicago to enable the Committee to work locally with contracting agencies, contractors, labor organizations, and social agencies in a four-State area noted for its concentration of Government contracts.

The Committee continued its broad educational programs designed to acquaint all Government contractors with their responsibilities under the standard nondiscrimination provision of their contracts, and to direct national attention to the need for and advantages of the Equal Job Opportunity program.

Job Practices Examined In Contractors' Plants

The employment practices and policies in more than 500 plants of Government contractors were examined during the year to determine the manner in which they were complying with the nondiscrimination provision of their contracts.

The compliance review program was designed to enable the Committee to discover and eliminate discrimination in employment on Government contracts without waiting for the filing of a complaint, to provide better information regarding the acceptance of the Equal Job Opportunity program, and to enable the Committee to measure progress more accurately.

The Government contracting agencies were asked in 1956 to examine their principal contractors at least once each year. They were asked to study carefully all aspects of the contractors' employment policies and practices and to take steps to correct any discriminatory practices which might be found. The program provided that the reports be reviewed by the Committee and that the Committee make recommendations for such additional measures as it considered necessary.

The first year's reviews covered 508 installations. Investigators reported the distribution of 51,402 members of minority groups among 575,269 workers in various lines of employment in 335 of these plants.

The information compiled from these compliance reviews gives the Federal Government, for the first time, detailed knowledge of the employment policies and practices of many of its principal contractors. The reports reveal the areas of employment being opened to members of minority groups, and directs attention to those situations which will require further efforts.

They also indicate that although Equal Job Opportunity is being extended in production work and the skilled trades, less progress has been made in the white-collar areas, and particularly in professional-technical and clerical jobs.

Although Negroes held nearly 9 percent of the jobs in the plants surveyed in detail, their representation in the white-collar work was strikingly lower.

The reports for individual cities showed that Negroes have the best representation in white-collar work in Chicago, Detroit, Philadelphia, and the New York City-Northern New Jersey area.

Auto Assembly Plants Studied

The difference between employment in white-collar and in other lines of work also was noted in the assembly of passenger automobiles. Particular attention was given to the assembly plants of two of the Nation's larger manufacturers. Reviews were conducted in 21 plants, including 5 in the South and 5 in border areas.

Negroes were nearly 12 percent of the total work force in these automobile plants, but they constituted less than one-fifth of 1 percent of the 5,171 in professional-technical and clerical positions. There were 2 Negroes in a professional-technical capacity in 1 northern plant and a total of 8 Negroes in clerical work in 3 northern plants.

Airlines Show Progress

Ten major airlines are reporting regularly to the Committee on progress being made in the extension of Equal Job Opportunity in ground employment. Positions have been opened to Negroes for the first time as reservation agents, in ticket sales and clerical work, and as mechanics. The lines reporting are American Airlines, Braniff International Airways, Capital Airlines, Delta Air Lines, Eastern Air Lines, Northwest Airlines, Pan American World Airways, Trans World Airlines, United Air Lines, and Western Airlines.

Figures on the number of Negroes in apprenticeship and on-the-job training in many industries were encouraging, because they represent a higher percentage than that of Negroes actually employed in skilled trades, as shown in 1956 United States Census reports. Approxi-

mately 7 percent of the trainees in 257 plants which offered apprenticeship or on-the-job training programs were Negroes. The national average of Negro employment in the crafts is 4.2 percent.

Four hundred twelve of the 508 plants examined in the last year were located in 24 standard metropolitan areas, each of which has a Negro population of 50,000 or more: Atlanta, Baltimore, Birmingham, Chicago, Cincinnati, Cleveland, Dallas, Detroit, Indianapolis, Kansas City, Los Angeles, Louisville, Memphis, Nashville, New Orleans, New York-Northern New Jersey, Norfolk-Portsmouth, Philadelphia, Pittsburgh, Richmond, St. Louis, San Francisco, and Washington, D. C.

Complaints Processed

The Committee has received 293 complaints charging Government contractors with discriminatory employment practices since it was established in August 1953, including 88 which were filed during the last year. One hundred eighty-seven have been closed and 106 are still under study and investigation.

Contractors' Past Records To Be Considered In Awards

The Committee has asked the principal Government contracting agencies to adopt a firmer approach with contractors in situations where they do not believe sufficient progress is being made in eliminating racial and religious discrimination.

The agencies have been asked to instruct their contracting officers to examine carefully the manner in which contractors have honored their obligations under the nondiscrimination provision in the performance of past contracts, before new awards are made to them. The agencies were asked specifically to deny awards where there was clear and convincing evidence of failure to comply with the clause in previous contracts.

The Committee also asked that before an award is made to a company which has not previously held a Government contract, the firm's employment practices be examined to determine whether it has a record which indicates it will be able to comply with the requirements of the nondiscrimination clause.

Eligibilty May Be Regained

A company which has been denied an award under this policy may regain its eligibility by taking action to correct the discriminatory situation which was responsible for the finding of ineligibility.

The text of the letter to executives of the principal Government contracting agencies, signed by Chairman Nixon:

"The Nation has made encouraging progress in eliminating racial and religious discrimination in work done under Government contracts since President Eisenhower established the Committee on Government Contracts in August 1953. Your agency shares in the credit for these gains.

"Despite this progress, however, much remains to be done. Discrimination because of race, religion, color, or national origin must not occur in the performance of Government contracts. The Committee believes that there should be even greater advances under the program in the future. Looking to that end, the Committee is of the opinion that where education, conciliation, mediation, and persuasion do not bring proper results, a firmer approach should be adopted.

"Consequently, the Committee requests your agency, in determining whether a prospective contractor is responsible and accordingly eligible to receive the award of a contract, to consider whether the contractor has an employment record which indicates that he will be able to conform to the requirements of the standard nondiscrimination clause.

"The Committee also requests your agency, in determining whether an existing contractor is responsible and accordingly eligible to receive additional awards of contracts, to deny awards, as appropriate, upon determination by your agency of clear and convincing evidence of noncompliance by Government contractors with the standard nondiscrimination clause. Awards of contracts, of course, should be resumed upon receipt of satisfactory evidence that corrective action has been taken by the contractor.

"I want to take this opportunity to thank you again, on behalf of the Committee, for your continued contributions to the National program to insure economic equality for all of America's people."

The contracting agencies have informed the Committee that they are revising their own regulations in order to execute this policy. The Committee has made arrangements to insure that all agencies are informed of the findings of ineligibility or restored eligibility made by any agency.

The staff of the Committee meet regularly with compliance officers of the contracting agencies for the purpose of keeping the agencies informed of all aspects of the Committee's work and to guide the agencies in the development and implementation of procedures necessary to carry out the Committee's policies.

The principal Government contracting agencies are the Atomic Energy Commission, Department of Agriculture, Central Intelligence Agency, Department of Commerce, Department of Defense, Federal Civil Defense Administration, Federal Trade Commission, General Accounting Office, General Services Administration, Government Printing Office, Department of Health, Education, and Welfare, Housing and Home Finance Agency, Department of Interior, Department of Justice, Department of Labor, National Advisory Committee for Aeronautics, Panama Canal Company, Post Office Department, Railroad Retirement Board, Selective Service System, Department of State, Tennessee Valley Authority, Department of the Treasury and the Veterans Administration.

National Conference Seeks To Increase Youth Training

The sponsorship of the Youth Training-Incentives Conference in Washington, February 1957, was one of the Committee's major educational activities during the year.

The Committee convened the conference to consider ways to stimulate more of the youth of minority groups to acquire the maximum training within their individual capacities, because it has found that their lack of such training contributes to their lack of economic equality.

Leaders of business and labor and the superintendents of public and parochial schools, with their chief guidance officers, attended from 16 cities having large minority group populations. This was the first time representatives of these groups had participated in a national meeting to seek ways of encouraging more of the youth of minority groups to continue their education and training to the limits of their individual capacities.

Counselor Group Assists

The American Personnel and Guidance Association assisted the Committee in planning and conducting the conference. The Committee invited the Association to cooperate because its membership includes those who are responsible for the counseling of the youth in the public and parochial school systems.

The 16 cities represented were Atlanta, Baltimore, Chicago, Cincinnati, Cleveland, Detroit, Indianapolis, Kansas City, Los Angeles, Louisville, New Orleans, New York City, Philadelphia, Pittsburgh, St. Louis, and Washington, D. C.

The discussions at the conference emphasized the responsibility of leaders of individual communities for the development of programs to stimulate more of the youth of minority groups to train for skilled employment. The essential elements of such programs were described as:

☆ Action by businessmen and local labor leaders to provide all youth with more opportunities for employment and for apprenticeship and on-the-job training;

☆ Dissemination of information about expanded job opportunities as widely as possible among minority group youth and their parents; and,

☆ Programs in the schools to convince the youth that new opportunities await them and to persuade them to take training.

Results Reported

Since the conference, local programs to stimulate the youth to train have been undertaken in several communities.

CHICAGO: Civic, educational, and labor leaders in Chicago expect the city's manpower requirements survey to make substantial contributions to the stimulation of more of the youth of minority groups to seek higher training.

The study reveals the community's future manpower needs, in terms of numbers of workers and kinds of skills required, and the information has been made available to the public school system for the guidance of student counseling personnel.

CINCINNATI: Clues for the early identification of the especially able student are provided for teachers in primary and elementary manuals which have been introduced in the public schools. The manuals are designed to give the teacher more skill in discovering the able learner in his early school years. The program helps meet the need of early recognition of the capacities of the youth of minority groups and encouragement for them to continue their training and education for higher levels of employment.

The city's School and Community Committee is developing information concerning job opportunities now or soon to be available to the youth of minority groups and compiling a series of "success stories" about members of minority groups in fields which only recently have been opened to them.

CLEVELAND: The Cleveland Community Relations Board and the Cleveland Board of Education are cooperating to increase apprenticeship training opportunities for the youth of minority groups. The Board of Education has stated that as a matter of policy, apprenticeship training programs which make use of the publicly owned equipment and facilities of the school system should be equally available to all qualified applicants for that training. The Board of Education participates in the selection of candidates for apprenticeship training.

DETROIT: The Automotive Tool & Die Manufacturers Association of Detroit, the public school system, and the United Automobile, Aircraft & Agricultural Implement Workers of America, AFL-CIO, have cooperated with the President's Committee to introduce Negro youth into apprenticeship training for the tool and die making trade.

INDIANAPOLIS: The city has strengthened the counseling program in the high school which serves most of the city's Negro students. Counseling services for students have been increased tenfold and the school is working closely with social agencies concerned with the working toward the elimination of racial and religious discrimination in employment.

PITTSBURGH: The Urban League of Pittsburgh has added a special guidance counselor to its staff and is intensifying its efforts to stimulate more of the Negro youth to acquire higher skills. The League, through community organization work, is seeking out the parents of individual students who show promise. Pittsburgh League officials are especially concerned about those students who reveal ability and who wish to continue their study and training but whose home environment is discouraging.

The Committee in June asked the leaders of more than 50 major business firms to include an Equal Job Opportunity emblem in display recruitment advertising in newspapers and periodicals as a means of making members of minority groups more aware of opportunities presently available to them. First response to the proposal included acceptance of the suggestion and agreement to use the emblem from firms whose total employment exceeds 400,000 people. Nongovernmental social agencies are cooperating with the Committee in local programs to promote wider use of the emblem by employers.

* * *

The Committee's poster, proclaiming that "Our way of life means Equal Job Opportunity for everyone, regardless of race, religion, color, or national origin," was displayed on 25,000 U. S. Mail trucks in more than 3,000 cities during the last 2 weeks of 1956. Public attention to the poster included photographs, stories, and editorials published in newspapers throughout the Nation, and the use of a filmed announcement by more than 175 television stations.

* * *

Members of the Committee and the Committee's staff participated during the year in 64 meetings and workshops sponsored by business and labor groups, by nongovernmental social agencies concerned with the elimination of discriminatory employment practices, and by State and municipal nondiscrimination bodies.

* * *

More than 145,000 pieces of Committee literature was distributed during the year through the contracting agencies, at meetings and workshops and by mail. Two hundred copies of the film "Commencement" are in circulation throughout the Nation, for showing to management, labor, and social agency groups, and for use in educational institutions.

Regional Office Increases Local Impact of Programs

The Committee established a Midwest Regional Office in Chicago in order to develop closer and more productive relations with those most concerned with the elimination of discrimination in employment in an area which has a significant concentration of Government contract activity. The Midwest region includes the States of Illinois, Indiana, Michigan, and Wisconsin.

The establishment of the Regional Office was announced when the Committee held a series of meetings in Chicago on April 30 and May 1, 1957. Leaders of business, labor, and social agencies met with the Committee in three separate sessions on April 30. The Committee's subcommittee for complaints and compliance reviews met with more than 150 representatives of Government contracting agencies the following day. The Chicago meeting was the second the Committee has held outside of Washington. The first was in Dallas in May 1955.

The Regional Office has worked with members of minority groups, Government contractors and other employers, Government contracting agencies, labor organizations, and social agencies concerned with the elimination of discrimination in employment.

Members of minority groups, and social agencies representing them, have filed complaints with the Regional Office against contractors within the four-State area. The Office also has cooperated with minority group agencies in educational efforts designed to better acquaint their members with the Committee's objectives and programs.

The Regional Office has assisted employers in the development and execution of Equal Job Opportunity programs within their own organizations. This assistance has included guidance in the elimination of discriminatory questions from application forms, and in the preparation and effective communication of a company's statement of nondiscrimination policy throughout the firm to supervisors, foremen, and personnel and recruitment workers, and outside the firm to sources of recruitment, including employment agencies, social agencies, the schools, and labor organizations.

The Regional Office also has advised employers regarding the expansion of their sources of recruitment to increase the numbers of minority group applicants, and in developing step-by-step programs for the actual introduction of members of minority groups into a work force.

Local offices of Government contracting agencies are obtaining assistance from the Regional Office of the Committee through regular meetings held with the agencies' compliance officers and through special meetings and consultation on particular problems.

Conclusion

The President's Committee on Government Contracts during the past year continued to strengthen the Federal Government's program to eliminate discrimination because of race, religion, color, or national origin in work performed under Government contracts. Several important steps were taken.

As in past years, the Committee devoted a major portion of its attention to the direct problem of opening job opportunities for members of minority groups. In addition, the Committee developed new approaches to the furtherance of equal economic opportunity.

The inauguration of the compliance review program and the adoption of an enforcement policy which considers a company's past record were actions which strengthen the Government's direct efforts to widen the job horizons of members of minority groups.

The compliance review program enables the Federal Government to initiate more aggressive action and to examine the manner in which large numbers of contractors are complying with the nondiscrimination provision of their Government contracts. It also provides the Committee with a means of measuring progress.

The decision to consider a company's past nondiscrimination performance as a factor in determining its eligibility for contract awards also gives the Government an opportunity to initiate action in situations where discriminatory employment practices have been found in Government contract work.

The Committee developed a new approach to meet the problem created by the need for an adequate supply of qualified minority group applicants which would give full meaning to the opening of new job opportunities. The Youth Training-Incentives Conference directed national attention to the problem of encouraging more youth of minority groups to seek higher training and education. This conference has been fol-

lowed in many communities by similar local programs.

The Committee expects that these local efforts will assist in extending equality in employment by increasing the number of qualified applicants, which, in turn, will encourage still more youth to prepare for skilled employment.

The opening of its first field office was the Committee's second new approach. The Midwest Regional Office in Chicago has intensified the local impact of the Committee's program in a four-State area in which there is an unusual concentration of Government contract activity. This is increasing the Committee's effectiveness in dealing with complainants, contractors, and contracting agencies.

The Committee is confident that the vigorous prosecution of its program, with its added dimensions, will accelerate the extension of Equal Job Opportunity in Government contract work.

HOUSING

Publicly-Assisted Housing—New York

Norris G. SHERVINGTON v. PELHAM HALL APARTMENTS, INC., et al.

New York State Commission Against Discrimination, July 18, 1957, Complaint Case No. CH-4466-56.

SUMMARY: Shervington, a Negro, filed a complaint with the New York State Commission Against Discrimination against the owners of an apartment building. The complaint stated that the apartment owners had discriminated against the complainant because of his color in the rental of apartments in "publicly-assisted housing accommodations" in violation of the state Law Against Discrimination (see 1 Race Rel. L. Rep. 739). The apartment building was built with money obtained through a mortgage insured by the Federal Housing Administration, which brings it within the definition of "publicly-assisted housing." Probable cause was found by the SCAD for the complaint. At the hearing held by the Commission the respondents did not deny the discrimination, but defended on the grounds that the state statute conferring jurisdiction on the Commission was unconstitutional and that the commitment for mortgage insurance was obtained before the effective date of the act. The Commission held that it could not pass on the constitutionality of the statute and that the mortgage insurance was obtained after the effective date of the act. An order was issued requiring the respondents to cease discrimination on the basis of race or color in the rental of apartments.

OPINION

On December 13, 1956, the complainant, who is a Negro, filed a verified complaint with this Commission in which he alleged that he had been discriminated against by the respondents on account of his color and in violation of the Law Against Discrimination in that the respondents had refused to rent or lease and had withheld from him publicly-assisted housing accommodations in a multiple dwelling known as Rochelle Arms, situated in New Rochelle, New York and owned by the respondent, Pelham Hall Apartments, Inc.

The complaint was investigated by the Chairman of this Commission as Investigating Commissioner and probable cause was found by him to credit the allegations of the complaint. Thereafter he endeavored by conference, conciliation and persuasion to eliminate the unlawful discriminatory practice. After a number of conferences, the Investigating Commissioner ordered a statutory hearing as provided for in Section 297 of the Law Against Discrimination and accordingly a notice of hearing was issued and served on the respondents in the name of the Commission on May 20, 1957 and the undersigned Commissioners were designated to conduct the hearing.

The case in support of the complainant was presented before the Commission by Henry Spitz, the Commission's General Counsel and the respondents have appeared by their attorney, Joseph R. Pisani. The complaint has been amended pursuant to stipulation between the attorneys for the parties and the respondents have duly filed their answer.

By further stipulation between the attorneys for the respective parties the respondents have interposed no denials to the allegations of the amended complaint and such allegations therefore stand as admitted pursuant to the provisions of paragraph (d) of Rule 6 of the Rules Governing Practice and Procedure before this Commission.

[*Defenses*]

The respondents' answer, however, interposes three separate defenses. The first two defenses challenge the constitutionality of Chapter 563 of the Laws of 1956 which confers jurisdiction on this Commission over publicly-assisted housing accommodations as therein defined. With respect to these two defenses, the Hearing Commissioners believe that, as the duly authorized agency required to administer the Law the constitutionality of which is questioned, the Commission must proceed on the assumption that the Law is valid in all respects and that it has no legal authority to question the constitutionality of this or any other act of the legislature under which it may be acting. This principle has been approved and sustained by the Courts of this State and of the United States. (See Black River Regulating District vs. Adirondack Lake Club, 307 N.Y. 475 and Engineers Public Services Company vs. Securities and Exchange Commission, 138 F. 2d 936.)

The third defense interposed by the respondents alleges that the multiple dwelling in question does not constitute publicly-assisted housing accommodations within the meaning of the Law Against Discrimination because "the federal insurance of the mortgage loan in question was contracted to be given by the Federal Housing Administration on June 30, 1955 pursuant to a written commitment dated on that day which was one day prior to July 1, 1955," which is the date set forth in the Law in question as the date after which the Law shall become effective.

[*Effect of Commitment*]

In our opinion this contention cannot be sustained. The issuance of a *commitment* by the Federal Housing Administration does not constitute the *insurance* by the federal government or an agency thereof of a loan to finance the construction of the premises in question. The commitment is only a statement of the terms and conditions upon which the mortgage *will be insured* if eventually all of the details with respect to the proposed structure are found to be in full compliance with the rules and regulations of the Federal Housing Administration and satisfactory to the Federal Housing Commissioner. The terms of the commitment itself and the Rules and Regulations of the Federal Housing Administration (e. g. sections 232.1; 232.2; 232.19 and particularly 233.4) describing the insurance system, when the mortgage becomes insured and when the advances of money made under the building loan agreement are actually insured as to repayment, are all squarely in conflict with respondents' contention that their payment of preliminary fees such as the application and commitment fees, made the commitment a legally enforceable contract and an irrevocable obligation to insure.

[*Commitment Assigned*]

As a matter of fact the commitment dated June 30, 1955 which was to the Irving Trust Company was thereafter assigned by the Irving Trust Company to the Lincoln Savings Bank of Brooklyn and the building loan agreement and mortgage notes executed by the respondent, Pelham Hall Apartments, Inc. to the Lincoln Savings Bank of Brooklyn are dated November 18, 1955. Thereafter and to and including May 8, 1957 advances were made pursuant to the terms of the agreement by the bank to Pelham Hall Apartments, Inc. and each of such advances which was insurable was insured by the Federal Housing Administration at the time the advance was made.

In addition to the monies advanced and insured subsequent to the commitment dated June 30, 1955, the lending bank requested on May 8, 1957 approval from the Federal Housing Administration for insurance to cover a proposed supplemental advance to the respondent, Pelham Hall Apartments, Inc. in the amount of $209,500 which was not covered by the original building loan agreement of November 18, 1955. On June 3, 1957 the Federal Housing Administration issued a commitment for insurance for this supplemental loan and on June 6, 1957 Pelham Hall Apartments, Inc. signed a mortgage note to the bank for said supplemental sum which was thereupon given both initial and final endorsement and approval by the Federal Housing Administration.

Both of these mortgage loans insured by the

Federal Housing Administration are now in full force and effect.

The construction of the building itself did not occur until after July 1, 1955. Excavation commenced on September 1, 1955 and the work of construction continued until shortly before the closing of the final insured loan on June 6, 1957.

[*SCAD Jurisdiction*]

It is clear, therefore, that the housing accommodations in question known as Rochelle Arms, owned and controlled by the respondents, was constructed and financed in whole or in part by a loan the repayment of which is insured by an agency of the federal government after July 1, 1955 and is therefore subject to the jurisdiction of this Commission.

The allegations of the complainant that he was discriminated against by the respondents on account of his color having been admitted and the Hearing Commissioners having determined that the Commission has jurisdiction over the respondents and the subject matter as set forth in the amended complaint, we hereby direct that an order be issued directing the respondents to cease and desist from such unlawful discriminatory practices and containing such other provisions as will effectuate the purpose of the Law Against Discrimination, including a requirement for report of the manner of compliance.

Findings of fact and conclusions of law in conformity with this opinion and a proposed order shall be submitted to the Hearing Commissioners and served upon the attorney for the respondents within ten days from the date hereof by the Commission's General Counsel and the respondents may have five days thereafter to serve their objections, if any, thereto.

Dated: July 2, 1957.

s/ Ward B. Arbury
Presiding Hearing Commissioner

s/ J. Edward Conway
Hearing Commissioner

s/ Nicholas H. Pinto
Hearing Commissioner

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Upon all the evidence at the hearing herein (including respondents' admissions by their answer herein and respondents' concessions and stipulations at the hearing) the New York State Commission Against Discrimination by Presiding Hearing Commissioner Ward B. Arbury and Hearing Commissioners J. Edward Conway and Nicholas H. Pinto, finds that the respondents herein have engaged in unlawful discriminatory practices as defined in Article 15 of the Executive Law (Law Against Discrimination) and states its findings of fact, as follows:

FINDINGS OF FACT

The Complainant

1. The complainant, Norris G. Shervington, is a Negro, who on December 6, 1956, applied for housing accommodations located in premises 300 Pelham Road, New Rochelle, New York, known as Rochelle Arms.

The Housing Accommodations

2. The premises 300 Pelham Road, New Rochelle, New York, known as Rochelle Arms, is a multiple dwelling.

3. The housing accommodations for which complainant applied in Rochelle Arms is a 4½ room apartment.

4. Complainant was informed that the rental of the 4½ room apartment for which he was applying was $158 per month, plus additional charges for a TV outlet, air conditioning and an inner garage.

The Respondents

5. The respondent, Pelham Hall Apartments, Inc., is a corporation organized and existing by virtue of the laws of the State of New York. Pelham Hall Apartments, Inc. is the owner of Rochelle Arms. Alberico Pompa, Vincenzo Coconato and Joseph Markoly are officers of Pelham Hall Apartments, Inc., have acted as its managing agents individually and collectively and have the right to rent or lease the housing accommodations which it is offering to the public.

The Public Assistance

6. Rochelle Arms was constructed after July 1, 1955.

7. The construction of Rochelle Arms was financed in part by loans made after July 1,

1955, the repayment of which is insured by the Federal Housing Administration, an agency of the federal government.

8. The loans which financed the construction of Rochelle Arms and the repayment of which is insured by the Federal Housing Administration were made by the Lincoln Savings Bank of Brooklyn, a corporation organized and existing under and by virtue of the laws of the State of New York, to Pelham Hall Apartments, Inc., and are secured by mortgage.

9. The loans which financed the construction of Rochelle Arms and the repayment of which is insured by the Federal Housing Administration have not been paid and the matters complained of by the complainant herein occurred during the life of such loans and such insurance.

The Unlawful Discriminatory Practices

10. The respondents have discriminated and are discriminating against the complainant by refusing to rent or lease and otherwise denying to and withholding from him, because of his color, publicly-assisted housing accommodations located in premises 300 Pelham Road, New Rochelle, New York, known as Rochelle Arms:

a. The respondents misrepresented to Norris G. Shervington the date upon which the apartment he sought would be ready for occupancy;

b. The respondents accorded to Norris G. Shervington upon the occasion of his application for an apartment different treatment from that customarily accorded white applicants;

c. The respondents accorded the application of Norris G. Shervington for an apartment, after it was filed, different treatment from that accorded the applications of white applicants in circumstances substantially similar to those of Norris G. Shervington, apart from color;

d. The respondents adopted and carried out a policy of deliberate delay in taking action upon the application of Norris G. Shervington;

e. The respondents refused to rent or lease to Norris G. Shervington the apartment he sought after receipt of all necessary information to establish his qualifications for tenancy in all respects, according to the standards set by the respondents themselves in accepting white tenants;

f. The respondents failed and refused to consider the application of Norris G. Shervington for an apartment without reference to his race and color.

The Loan and the Insurance of the Repayment of the Loan by the Federal Government

11. The Federal Housing Administration is an agency of the federal government created by the National Housing Act, as amended, (12 U.S.C. Chapter 13).

12. The powers of the Federal Housing Administration are exercised by the Federal Housing Commissioner pursuant to the National Housing Act, as amended (12 U.S.C. Chapter 13), and the rules and regulations issued by the Federal Housing Commissioner under the National Housing Act, as amended.

13. On March 31, 1954, an application for mortgage insurance, under Section 207 of the National Housing Act, was made to the Federal Housing Commissioner by the Irving Trust Company of 1 Wall Street, New York, New York, as proposed mortgagee and by Vincenzo Coconato, Alberico Pompa and Vincent J. Coconato as sponsors, applying for insurance of a first mortgage loan in the principal amount of $1,444,000 on a proposed building project named Rochelle Arms described as an "Elevator Apartment—Eight (8) Story—Fireproof". The name of the proposed mortgagor was stated to be "Corp. to be formed." The project number assigned by the FHA was 012-00510A.

14. On November 19, 1954, an amended application for mortgage insurance, under Section 207 of the National Housing Act, was made to the Federal Housing Commissioner by Irving Trust Company as proposed mortgagee and by Vincenzo Coconato, Alberico Pompa and Vincent J. Coconato as sponsors for insurance of a first mortgage loan in the principal amount of $1,720,000 on the proposed building project, Rochelle Arms, Project No. 012-00510A. The name of the proposed mortgagor was stated to be "Corporation to be formed."

15. In its application for mortgage insurance dated March 31, 1954, the proposed mortgagee, Irving Trust Company, specified that its application was subject to the commitment of the

Federal Housing Commissioner, its own final action, and payment of its charges as set forth under "Financing Expense" at the rate of 1½% in the amount of $21,660. The said application further stated:

> "Herewith is check for $2,166. which is in payment of the fee required by Section I of Administrative Rules, now effective, to be paid at the time of submitting application."

16. In its amended application for mortgage insurance dated November 19, 1954, the proposed mortgagee, Irving Trust Company, specified that its application was subject to the commitment of the Federal Housing Commissioner, its own final action, and payment of its charges as set forth under "Financing Expense" at the rate of 1½% in the amount of $25,800. The application further stated:

> "Herewith is additional check for $414.00 which is in payment of the fee required by Section I of Administrative Rules, now effective, to be paid at the time of submitting application."

17. On June 30, 1955, the Federal Housing Commissioner issued a Commitment for Insurance with respect to Project No. 012-00510A. The name of the proposed mortgagee as given in the Commitment for Insurance was Irving Trust Company. The names of the sponsors as given in the Commitment for Insurance were: Alberico Pompa, Vincenzo Coconato, Vincent J. Coconato and Joseph Markoly; and the name of the proposed mortgagor was given as "Rochelle Arms."

18. The terms of the Commitment for Insurance, dated June 30, 1955, naming the Irving Trust Company of New York as proposed mortgagee were stated to be as follows:

> "This Administration, having considered your application and exhibits submitted therewith for the insurance of a mortgage upon the above project, finds said project to be eligible for insurance under the provisions of Section 207 of the National Housing Act, and Administrative Rules and Regulations thereunder now in effect. Subject to such Rules and Regulations and to the following conditions, the Commissioner will endorse as insured (but only to the extent of advances approved by the Commissioner) an original credit instrument, secured by a first mortgage upon the land and property included in the project, as hereinafter identified, in an amount not to exceed $1,676,000."

19. Fifteen conditions were listed by the Federal Housing Commissioner as those to which the Commitment for Insurance dated June 30, 1955, was subject, including the terms and form of the proposed loan, title evidence, assurance of completion of the project satisfactory to the Federal Housing Commissioner and evidence of deposit with the proposed mortgagee by the proposed mortgagor of funds required over and above mortgage proceeds for completion of the project.

20. On September 19, 1955, the Irving Trust Company of New York, by letter of that date to the Federal Housing Administration, stated that it assigned to the Lincoln Savings Bank of Brooklyn all its right, title and interest as proposed mortgagee named in the Commitment for Insurance with respect to Rochelle Arms, FHA No. 012-00510A.

21. On September 19, 1955, the Lincoln Savings Bank of Brooklyn, by letter of that date to the Director of the Federal Housing Administration, stated that it would accept an assignment from the Irving Trust Company of all their right, title and interest in the Rochelle Arms project No. 012-00510A, and requested an amendment of the Statement of Financial Requirements to reflect a service charge of 1½% which was ¼% less than the service charge specified by the Irving Trust Company on the principal amount of $1,676,000 of the proposed mortgage loan.

22. On September 21, 1955, the Federal Housing Commissioner struck out the name of the Irving Trust Company from the Commitment for Insurance and inserted in its stead the name of Lincoln Savings Bank of Brooklyn as mortgagee and initialled and dated such change as of September 21, 1955.

23. On November 18, 1955, Pelham Hall Apartments, Inc., as Borrower and the Lincoln Savings Bank of Brooklyn as Lender executed a Building Loan Agreement with respect to project No. 012-00510A.

24. The said Building Loan Agreement of November 18, 1955, contained the following clauses:

"Whereas, the Borrower is the owner in fee of the lands hereinafter described in Exhibit 'A' hereto attached and made a part hereof, and has applied to the Lender for a mortgage loan of ONE MILLION SIX HUNDRED SEVENTY-SIX THOUSAND and no/100 Dollars ($1,676,000.00) to aid the Borrower in the construction on said land of a certain Housing project (hereinafter called the 'project'), in accordance with certain Drawings and Specifications hereinafter referred to; and

"Whereas, the Borrower understands that the Lender has received a commitment from the Federal Housing Commissioner (hereinafter called 'Commissioner'), for insurance of said loan under the provisions of the National Housing Act and intends upon execution of the hereinafter-mentioned Note and Mortgage to have same endorsed for insurance by the Commissioner; identified as FHA Project No. 012-00510A . . ."

25. The said Building Loan Agreement of November 18, 1955, provided that the Borrower agreed to take and the Lender agreed to make a loan in the principal amount of $1,676,000 to be evidenced by a credit instrument in the form of a note executed by the Borrower and payable to the Lender or order and secured by a first mortgage; and the Borrower agreed to erect by January 1, 1957, a Housing project described as Pelham Hall Apartments, Inc. FHA Project No. 012-00510A.

26. On November 18, 1955, Pelham Hall Apartments, Inc. executed a credit instrument in the form of a mortgage note to the Lincoln Savings Bank of Brooklyn in the principal amount of one million six hunderd seventy-six thousand dollars ($1,676,000) payable in monthly installments with the final payment due and payable on May 1, 1996.

27. On November 18, 1955, the Federal Housing Commissioner endorsed the Mortgage Note of Pelham Hall Apartments, Inc. to Lincoln Savings Bank of Brooklyn, dated November 18, 1955, in the principal amount of $1,676,000., as follows:

STATE OF NEW YORK
Loan No. .....
MORTGAGE NOTE
TO
NO. 012-00510A

Insured under Section 207 of the National Housing Act and Regulations thereunder of the Federal Housing Commissioner
In effect on November 18, 1955
To the Extent of Advances Approved by the Commissioner
FEDERAL HOUSING COMMISSIONER
By s/ Joseph Nardone
Authorized Agent
Date: Nov. 18, 1955

28. Between November 18, 1955 and June 6, 1957, the Lincoln Savings Bank of Brooklyn made the following advances to Pelham Hall Apartments, Inc. with respect to Rochelle Arms, FHA Project No. 012-00510A, totalling $1,676,000, the amount of the loan which the Borrower, Pelham Hall Apartments, Inc. agreed to take and the Lender, Lincoln Savings Bank of Brooklyn agreed to make by the Building Loan Agreement between them dated November 18, 1955.

Date	*Amount*
February 23, 1956	$ 20,438.01
March 13, 1956	59,150.20
April 13, 1956	47,532.18
May 11, 1956	144,113.78
June 13, 1956	180,925.49
July 13, 1956	123,556.09
August 8, 1956	136,211.46
September 11, 1956	165,603.15
October 10, 1956	130,365.92
November 9, 1956	127,687.82
December 10, 1956	140,469.07
January 18, 1957	128,888.90
February 14, 1957	37,950.76
March 29, 1957	13,986.39
April 12, 1957	22,428.96
May 15, 1957	25,771.62
June 6, 1957	170,820.20
TOTAL	$1,676,000.00

29. On June 6, 1957, the Federal Housing Commissioner made the following notation on the Mortgage Note of November 18, 1955, below the insurance endorsement.

A total sum of $1,676,000.00 has been approved for insurance hereunder by the Commissioner.

Federal Housing Commissioner
by s/ Joseph Nardone
Authorized Agent
Date June 6, 1957

Reference is made to the Act and to the Regulations thereunder covering assignments of the insurance protection on this note.

30. The Building Loan Agreement of November 18, 1955, provided that applications for advances under the agreement were to be made by the borrower to the lender on FHA form No. 2403, on or about the first day of each month after the commencement of work and that the borrower would be entitled to payment only in the amount approved by the lender and the Federal Housing Commissioner with respect to each application.

31. FHA form No. 2403 includes a "request for payment" by the mortgagor to the mortgagee; "an application for insurance of advance of mortgage proceeds" for the use of the mortgagee by which the mortgagee informs the Federal Housing Administration that it has received a request for payment and that the mortgagee intends to disburse the sum which it believes is now payable, provided the mortgagee receives prior approval for mortgage insurance. FHA form No. 2403 also contains a "certificate of mortgage insurance" for the use of the Federal Housing Administration, by its authorized agent, by which the Federal Housing Administration informs the mortgagee as to the amount it approves for advance in accordance with the building loan agreement; and of the part of such amount it approves for mortgage insurance.

32. The last request for payment by the mortgagor, Pelham Hall Apartments, Inc. and application for insurance of advance of mortgage proceeds by the mortgagee, Lincoln Savings Bank of Brooklyn, under the building loan agreement of November 18, 1955, to the total of $1,676,000 was made on May 8, 1957. Such application was denominated "final", was numbered advance No. 20, and covered the item specified as "Ten per cent holdback" totalling $170,920.02. Such "Ten per cent holdback" constituted the total of the amounts of ten per cent of each prior advance which had been held back by the lender from the borrower pursuant to the terms of the building loan agreement of November 18, 1955 and the rules and regulations of the Federal Housing Administration.

33. On May 8, 1957, Lincoln Savings Bank of Brooklyn made a separate "Application for Insurance of Advance of Mortgage Proceeds", said proposed Advance being numbered No. 21 and denominated "Supplemental" and covering an item specified as "Supplementary Mortgage" in the sum of $209,500.

34. On June 3, 1957, the Federal Housing Commissioner issued a Commitment for Insurance to the Lincoln Savings Bank of Brooklyn with respect to the proposed additional loan of $209,500 to Pelham Hall Apartments, Inc. on "Project No. 012-00510 Amended", to be secured by a consolidated mortgage covering the initial loan of $1,676,000 and the additional loan of $209,500.

35. On June 6, 1957, Pelham Hall Apartments, Inc. executed a Mortgage Note to Lincoln Savings Bank of Brooklyn in the principal sum of $209,500.

36. On June 6, 1957, the Federal Housing Commissioner endorsed the Mortgage Note of Pelham Hall Apartments, Inc. to Lincoln Savings Bank of Brooklyn, dated June 6, 1957, in the principal amount of $209,500 as follows:

STATE OF NEW YORK
Loan No. .....
MORTGAGE NOTE
TO
NO. 012-00510A
Insured under Section 207 of the National Housing Act and Regulations thereunder of the Federal Housing Commissioner
In effect on June 3, 1957
To the Extent of Advances Approved by the Commissioner
FEDERAL HOUSING COMMISSIONER
by s/ Joseph Nardone
Authorized Agent
Date June 6, 1957

37. On June 6, 1957, the Federal Housing Commissioner made the following notation on the Mortgage Note of June 6, 1957, below the insurance endorsement:

A total sum of $209,500. has been approved for insurance hereunder by the Commissioner.
Federal Housing Commissioner
By s/ Joseph Nardone
Authorized Agent
Date June 6, 1957

Reference is made to the Act and to the Regulations thereunder covering assign-

ments of the insurance protection of this Note.

38. On June 27, 1957, the amount outstanding on the loans made by the Lincoln Savings Bank of Brooklyn to Pelham Hall Apartments, Inc. on FHA Project No. 012-00510A was $1,874,309.87.

39. On February 23, 1955, the City of New Rochelle, Bureau of Buildings, issued a receipt for "Building Fee" in the amount of $1535.50 to Rochelle Arms, Inc., which described the property involved as "S/W/C Pelham Rd & Centre Ave (Res Bldg—Multi Family Dwel)."

40. On June 21, 1955, the Bureau of Buildings of the City of New Rochelle issued a building permit for premises described as "S/W/C Pelham Road and Centre Avenue 144 families."

41. All fees required to be paid under the rules and regulations of the Federal Housing Administration were paid in connection with Project No. 012-00510A.

CONCLUSIONS OF LAW

Upon the basis of the foregoing Findings of Fact and upon all the evidence at the hearing herein (including respondents' admissions by their answer herein and respondents' concessions and stipulations at the hearing) the New York State Commission Against Discrimination, by Presiding Hearing Commissioner Ward B. Arbury and Hearing Commissioners J. Edward Conway and Nicholas H. Pinto, makes the following Conclusions of Law:

1. The premises 300 Pelham Road, New Rochelle, New York, known as Rochelle Arms, is a multiple dwelling as defined in section 292.12 of the Law Against Discrimination.

2. The housing which is located at premises 300 Pelham Road, New Rochelle, New York, known as Rochelle Arms, is housing located in a multiple dwelling, the construction of which was, after July 1, 1955, financed in part by loans, the repayment of which is insured by an agency of the Federal Government, namely the Federal Housing Administration; and the matters complained of by the complainant herein occurred during the life of such loans and such insurance.

3. The housing accommodations located at premises 300 Pelham Road, New Rochelle, New York, known as Rochelle Arms, are and at all times mentioned in the complaint herein, as amended, were publicly assisted housing accommodations as that term is defined in subdivisions 10, 11 and 12 of section 292 and subdivision 3 of section 296 of the Law Against Discrimination.

4. The Commission has jurisdiction over the subject matter of this proceeding, over the corporate respondent Pelham Hall Apartments, Inc., over the individual respondents, Alberico Pompa, Vincenzo Coconato and Joseph Markoly and over the complaint of Norris G. Shervington, as amended, herein.

5. The respondents, Pelham Hall Apartments, Inc., Alberico Pompa, Vincenzo Coconato and Joseph Markoly, committed unlawful discriminatory practices under section 296.3 of the Law Against Discrimination in that the respondents, from the date of the complainant's application on December 6, 1956, for housing accommodations in Rochelle Arms, have refused to and continue to refuse to rent or lease and have otherwise denied to and withheld from and continue to deny to and withhold from complainant, because of his color, publicly-assisted housing accommodations located in 300 Pelham Road, New Rochelle, New York, known as Rochelle Arms.

6. The construction of premises 300 Pelham Road, New Rochelle, New York, known as Rochelle Arms, was financed in part by a loan secured by a mortgage, in the amount of $1,676,000 made by the Lincoln Savings Bank of Brooklyn to Pelham Hall Apartments, Inc. pursuant to a building loan agreement executed on November 18, 1955, by and between the Lincoln Savings Bank of Brooklyn as Lender and Pelham Hall Apartments, Inc. as Borrower.

7. The repayment of said loan was insured by the Federal Housing Commissioner on November 18, 1955, by initial endorsement of the original credit instrument, to wit the mortgage note dated November 18, 1955, made by Pelham Hall Apartments, Inc., to Lincoln Savings Bank of Brooklyn; and the mortgage became an insured mortgage on November 18, 1955.

8. On June 6, 1957, the Federal Housing Commissioner approved for insurance by final endorsement on the said original credit instrument a total sum of $1,676,000 all of which was advanced by Lincoln Savings Bank of Brooklyn

to Pelham Hall Apartments, Inc. subsequent to November 18, 1955.

9. The Federal Housing Commissioner insured the repayment of the said loan of $1,676,000 made by the Lincoln Savings Bank of Brooklyn to Pelham Hall Apartments, Inc. following the issuance of a commitment to the Lincoln Savings Bank of Brooklyn on September 21, 1955, setting forth the terms and conditions upon which a proposed mortgage loan would be insured. Pelham Hall Apartments, Inc. is not mentioned in and is not a party to such commitment.

10. The commitment of September 21, 1955, to insure a proposed mortgage loan was issued to the Lincoln Savings Bank of Brooklyn, following the issuance of a commitment to the Irving Trust Company dated June 30, 1955. The Irving Trust Company on September 19, 1955, released such commitment by assignment to the Lincoln Savings Bank of Brooklyn; the Lincoln Savings Bank of Brooklyn agreed to accept the assignment and requested the Federal Housing Administration to amend the proposed terms with respect to the Mortgagee's service charges which amendment would be of substantial benefit to the proposed mortgagor; and the assignment was approved and accepted by the Federal Housing Commissioner on September 21, 1955.

11. The commitment for insurance on June 30, 1955, issued by the Federal Housing Commissioner upon the application of and to the proposed mortgagee Irving Trust Company did not create an obligation on the part of the proposed mortgagee Irving Trust Company to make a loan, or on the part of the corporate respondent herein, Pelham Hall Apartments, Inc. or of the individual respondents herein to take a loan and did not constitute insurance of a loan by the Federal Housing Administration; and Irving Trust Company did not make any loan to Pelham Hall Apartments, Inc. or to the individual respondents herein in connection with FHA Project No. 012-00510A the repayment of which was insured by the Federal Housing Administration.

12. No loan was made to finance the construction of Rochelle Arms, FHA Project No. 012-00510A, the repayment of which was insured by the Federal Housing Administration, until after July 1, 1955.

13. The construction of premises 300 Pelham Road, New Rochelle, New York, known as Rochelle Arms, FHA Project No. 012-00510A, was financed in part by an additional loan in the amount of $209,500 made by the Lincoln Savings Bank of Brooklyn to Pelham Hall Apartments, Inc. following application for approval of such additional loan for mortgage insurance by the Lincoln Savings Bank of Brooklyn to the Federal Housing Administration on May 8, 1957.

14. A commitment with respect to such proposed loan of $209,500 was issued by the Federal Housing Commissioner on June 3, 1957.

15. The said loan of $209,500 was insured on June 6, 1957, by the Federal Housing Commissioner by initial endorsement of the original credit instrument, to wit, a mortgage note in the amount of $209,500, dated June 6, 1957, made by Pelham Hall Apartments, Inc. to Lincoln Savings Bank of Brooklyn, said endorsement to take effect as of June 3, 1957; and on June 6, 1957, the Federal Housing Commissioner by final endorsement on said original credit instrument approved for insurance a total sum of $209,500 advanced by Lincoln Savings Bank of Brooklyn to Pelham Hall Apartments, Inc. pursuant to said mortgage note in the amount of $209,500 dated June 6, 1957.

16. On December 6, 1955, when the complainant applied for housing accommodations at premises 300 Pelham Road, New Rochelle, New York, known as Rochelle Arms, and at all times mentioned in his complaint, as amended, the said housing accommodations were and they continue to be within the definition of "publicly-assisted housing accommodations" set forth in subdivisions 10, 11 and 12 of section 292 of the Law Against Discrimination and said housing accommodations are not taken out of such definition by reason of the commitment issued by the Federal Housing Commissioner to the Irving Trust Company on June 30, 1955, or by the payment of an application fee or commitment fee in connection therewith.

ORDER

Upon the basis of the foregoing Findings of Fact and Conclusions of Law and pursuant to Section 297 of the New York State Law Against Discrimination (Executive Law, Article 15) it is hereby

ORDERED, by the New York State Commission Against Discrimination,

That the Respondents, Pelham Hall Apartments, Inc., its officers, directors, agents, successors, and assigns, and Alberico Pompa, Vincenzo Coconato and Joseph Markoly shall:

1. Cease and desist from:

a. Denying to and withholding from complainant, Norris G. Shervington, a four and one half room apartment, together with the privileges, services and facilities relating thereto, at premises 300 Pelham Road, New Rochelle, New York, known as (and hereinafter referred to as) Rochelle Arms.

b. Giving consideration to the factors of race, creed, color or national origin, in seeking and handling applications for apartments at Rochelle Arms, in accepting deposits or other monies from applicants for apartments at Rochelle Arms, in making inquiry as to the qualifications for tenancy of applicants for apartments at Rochelle Arms, in passing upon such qualifications and in accepting or rejecting said applicants, in negotiating for and executing leases at Rochelle Arms and in giving occupancy to tenants at Rochelle Arms, and in the conditions and privileges of tenancy at Rochelle Arms and in the furnishing of facilities or services in connection therewith.

2. Take the following affirmative action which, in the judgment of the State Commission Against Discrimination, will effectuate the purposes of the New York State Law Against Discrimination:

a. With respect to the housing accommodations sought by complainant:

(i) Set aside for, and offer to lease forthwith to the complainant the four and one half room apartment at Rochelle Arms for which he applied or a substantially similar four and one half room apartment at a rental of $158 a month, for a period of not less than two years from the date of execution of the lease. The complainant shall have a reasonable period of time within which to accept or reject said offer to lease.

(ii) If the complainant accepts such offer to lease, the respondents shall execute a written lease of the apartment to the complainant within five (5) days after receipt of written notice of such acceptance. The terms and conditions of such lease shall be substantially similar to the terms and conditions of leases executed by tenants of other apartments at Rochelle Arms during the period January 1, 1957 to June 30, 1957; and the complainant shall be accorded substantially the same privileges, services, benefits and rental concessions accorded to the most favored tenant or tenants in Rochelle Arms, whether such privileges, services, benefits or rental concessions have been granted by terms of lease or otherwise to such tenant or tenants.

(iii) If the complainant accepts the apartment and executes a lease therefor as aforesaid, respondents shall make said apartment available to the complainant fully ready for occupancy within ten (10) days after the execution of the lease.

b. Apply the same standards of evaluation to all applicants for apartments at Rochelle Arms, without regard to race, creed, color or national origin.

c. Issue written instructions in a form satisfactory to the Commission to all officers, directors, agents and employees of Pelham Hall Apartments, Inc., and to all persons now engaged or employed, or who may hereafter be employed or engaged within one year of the date of this order, by the respondents, explaining the requirements and objectives of the Law Against Discrimination and advising each such person of his individual responsibility for compliance with the Law Against Discrimination and his obligation to make such compliance meaningful and effective. Copies of such instructions signed by the said persons individually and acknowledging receipt and understanding thereof shall be transmitted to the Commission by the respondents.

d. Post the Commission Notice conspicuously in easily accessible and well-lighted places at Rochelle Arms, where it may be readily observed by those seeking housing accommodations or facilities or services in connection therewith, as required by the Commission's General Regulation No. 3.

e. Transmit to the Commission forthwith a statement listing each of the apartments at Rochelle Arms, which on the date of this order, was not rented or leased, giving the designation of the apartment, the number of rooms and the rental being asked.

f. For a period of one year from the date of this order, transmit to the Commission by the 10th day of each month, a record of the following information for the preceding month with respect to the housing accommodations at Rochelle Arms:

(i) The total number of apartments rented; the total number of apartments vacant; and, as to each vacant apartment, the number of rooms and the rental being asked.

(ii) The names and addresses of all persons who have applied for apartments.

(iii) The names and addresses of all applicants who have been accepted, and the names and addresses of all applicants who have been rejected, specifying as to each person accepted, the designation of the apartment, the number of rooms and the rental; and specifying, as to each person rejected, the reason for rejection.

g. Include in all advertising of the housing accommodations at Rochelle Arms, by newspaper, floor plan, pamphlet, booklet, sign or otherwise, a statement, in a form satisfactory to the Commission, giving notice that Rochelle Arms is publicly assisted housing, subject to the Law Against Discrimination, and that the apartments in Rochelle Arms are available for rental without reference to race, creed, color or national origin.

h. Notify the New York State Commission Against Discrimination at its office at 270 Broadway, New York 7, New York, in writing within fifteen (15) days of the date of service of this Order, as to the steps respondents have taken to comply with each item of this Order.

Dated: New York, New York
July 18, 1957

Ward B. Arbury
Presiding Hearing Commissioner

J. Edward Conway
Hearing Commissioner

Nicholas H. Pinto
Hearing Commissioner

SELECTIVE SERVICE
Local Boards—Louisiana

Two local Selective Service Boards in Monroe, Louisiana, have resigned in protest at the use of federal armed forces in the school integration case in Little Rock, Arkansas. The memorandum of resignation by the boards follows:

October 8, 1957

1. United States Selective Service Boards Numbers 46 and 161 resign their duties and obligations this date, after due deliberation and thought. We are not serving the best interest of our community by inducting into the Armed Forces of our country fellow citizens who are required to force integration with guns and bayonets.

2. Press releases point the intention of the President of the United States to use Federal armed forces when and where integration may meet local resistance.

3. Our collective opinion is "integration is the right of a State". When equal education advantages are available Federal Armed Forces are misplaced, in any state, when a majority of that State does not want integration.

4. These boards are unanimous in the opinion that our present problem of integration is caused by political aims of grasping politicians to gain the minority negro vote.

5. We are firmly convinced that the only remedy for this deplorable condition, now existing, is unity of our United States Senators and Congressmen from the Southern States, who will

vote unanimously to correct oppressive laws now existing and cast away their individual political future for the benefit of their constituency and the salvation of their ideals and home land.

6. We support and suggest to our Parish Grand Juries that each itinerant agitator be questioned, under oath, as to the source of his fees and income and when found guilty of violation of the laws of this State, be so charged.

7. We wish to express our sincere appreciation to our many colored friends, and citizens, of this Parish who have openly declared themselves against this attempt to disrupt their lives and also their social status.

8. We as members of these Draft Boards do not desire social integration or intermarriage and we believe this is the ultimate desire of those who wish to destroy this country.

9. We hereby instruct our chief clerks to record this joint and unanimous resignation of Selective Service Boards Numbers 46 and 161 members on the official records of these Boards this date.

In Resignation:

Local Board No. 46:	Local Board No. 161:
s/ T. O. Bancroft Chairman	s/ E. J. Seymour Chairman
s/ A. C. Ransom Secretary	s/ J. W. Caldwell Secretary
s/ Grayson Guthrie Member	s/ R. M. Hines Member
s/ Prentiss G. Boyd Member	s/ E. E. Eaves Member
s/ John Birdsong Member	

ATTORNEYS GENERAL

PUBLIC ACCOMMODATIONS
Nursing Homes—Michigan

The Attorney General of Michigan has issued an opinion concerning the applicability of that state's "Civil Rights Law" to a privately-operated nursing home located in the leased premises of a county infirmary. Such homes are not places of public accommodation under the provisions of the statute and the admission policies of such homes, with respect to restriction to a particular race, are not governed by the statute, the opinion states.

STATE OF MICHIGAN
THOMAS M. KAVANAGH,
ATTORNEY GENERAL

CIVIL RIGHTS:

Privately operated nursing home for aged not "place of public accommodation" under Michigan Civil Rights Law.

Opinion No. 3013 July 17, 1957

Mr. Marion G. Paul
Prosecuting Attorney
Benzie County
Beulah, Michigan

Dear Mr. Paul:

Reference is had to your inquiry, requesting an opinion on the question whether the lessees of the county infirmary can legally restrict their facilities to the Caucasian race.

The present lease, entered into on March 19, 1956, is between "the Benzie Co. Social Welfare Board for and in behalf of the Board of Supervisors of the County of Benzie," as the lessor, and Mr. and Mrs. Paul F. Rockwell, the lessee. This instrument leases the county infirmary for three years from and after April 1, 1956, to be occupied "for use as a private convalescent, nursing and boarding home to be known as 'Hill Haven.'"

We note in passing that Article VIII, Section 11 of the Constitution of Michigan, which is stated in the lease as the source of authority to lease the infirmary, actually authorizes any county to "maintain an infirmary for the care and support of its indigent poor and unfortunate." We also note that Act No. 156 of the Public Acts of 1851, as amended,[1] authorizes the *board of supervisors* to lease county land.

We find upon inquiry that the State Department of Social Welfare licensed "Hill Haven" in 1955 as a properly operating private convalescent nursing home, and that the State Health Department, which now has the responsibility of licensing nursing homes for the aged,[2] on Jaunary 24, 1957, licensed "Hill Haven" for the calendar year 1957 as a properly operating private facility. In rendering this opinion, we proceed on the basis that the determination made by the authorized administrative agency is controlling, in the absence of judicial determination to the contrary. Therefore, we treat "Hill Haven" as a private convalescent, nursing and boarding home.

Your inquiry arises as a result of that provision of the lease which contains the following language:

> "It is further agreed that the said party of the first part . . . shall in no way interfere with the parties of the second part's establishment of operating policies."

In connection with the investigation of your inquiry, we learn that of 32 patients resident at Hill Haven as of the date of inquiry, 26 were receiving either county or state aid, or both, and 6 are private patients. We also learn that the county department of welfare sought to obtain admission of a colored person to Hill

1. CLS, §46.11; Stat Ann, Current Material, §5.331.
2. Act No. 139, PA 1956; §331.651 et seq., CLS; §14.1281 et seq., Stat Ann Current Material.

Haven, that such admission was refused on grounds of the exclusive prerogative of the lessees to establish operating policies, including admissions, under the language just above quoted.

Your question, then, is whether the Michigan Civil Rights law,[3] which provides in part that—

> "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, . . . restaurants, eating houses . . . and all other places of public accommodation. . . ."

is applicable to Hill Haven.

This office has recently ruled that licensed private child caring agencies cannot be required, via the rule making power of the state department which licenses such agencies, to accept standards of admission as imposed by such state department, for the reason that the power to establish admission standards remains the prerogative of the private agencies.[4] For this reason it was ruled that freedom from racial discrimination, however desirable, cannot be forcibly imposed upon the private agencies.

3. §750.146 et seq., CLS; §28.343 et seq., Stat Ann Current Material.
4. O.A.G. No. 2170, December 18, 1956 Report, Vol. II, p. 754.

The same reasoning applies to the inquiry now before us. Since Hill Haven is a licensed private facility, it is not a place of public accommodation as defined by the Michigan Civil Rights Law. Therefore its admission policies are not governed by the Civil Rights Law, and, as governed by the terms of the lease, lie in the discretion of the lessees.

Therefore, the answer to your question is that the operators of Hill Haven nursing, convalescent and boarding home are within their contractual rights in restricting facilities to members of the Caucasian race. This ruling, it is emphasized, is made on the basis that Hill Haven is in fact being operated as a private facility.

In this opinion we are not ruling on the validity of the lease arrangement but only on the question of whether privately operated nursing homes come under Michigan Civil Rights Law.

We further add that nothing in this opinion supports or should suggest that public accommodations, including public infirmaries, are not governed by the provisions of the Michigan Civil Rights Law.

Very truly yours,

THOMAS M. KAVANAGH
Attorney General

EMPLOYMENT
Fair Employment Laws—Wisconsin

At the time the Wisconsin legislature was considering the enactment of the bill which was later enacted as Chapter 266, 1957 (See p. 1154, *supra*), the state Attorney General was requested for an opinion as to the constitutionality of the proposed legislation. The purpose of the bill is to provide enforcement procedures for the state Industrial Commission in racial discrimination cases. The attorney general expressed the view that the bill, if enacted, would be constitutional.

20 May 1957

The Honorable The Senate
State Capitol
Madison, Wisconsin

Dear Sirs:

Senate Resolution No. 19 requests my opinion as to whether Bill No. 327 S., concerning discriminatory employment practices, would, if adopted, change the result in a situation such as confronted the Supreme Court in Ross v. Ebert, 275 Wis. 523, and whether the proposed method of enforcement as set forth in said bill would be constitutional.

It is my opinion that the enactment of Bill 327, S. would change the result reached by the Supreme Court in Ross v. Ebert, supra.

The court recognized in its decision that sec-

tions 111.31 to 111.36 of the statutes provide that racial discrimination in employment was undesirable, and that it was the public policy of this state to encourage and foster employment without such discrimination to the fullest extent practicable. The court stated, however, that the legislature had not declared that any such discrimination was illegal and it had not provided for an enforcement of these declared policies. Bill No. 327, S. would give the Industrial Commission power to eliminate any discriminatory employment practices. The bill provides that the Industrial Commission shall endeavor to eliminate any discriminatory employment practice by conference, conciliation or persuasion. In the event these methods prove unsuccessful in eliminating the discriminatory practice, the commission shall hold a hearing, and if it finds that a discriminatory practice exists, the commission is given the power to enter an enforcement order. The enactment of this bill would provide the necessary enforcement provisions which the Supreme Court stated the legislature had not previously included in the Fair Employment Code provisions of the statutes.

It is my opinion that the proposed method of enforcement would be constitutional.

The United States Supreme Court has determined that a state law forbidding labor organizations from denying membership because of race, color or creed, and prescribing penalties, does not violate the United States Constitution. The court said in Railway Mail Ass'n v. Corsi, (1945) 326 U. S. 88, 65 S. Ct. 1483, 1487, 89 L. ed. 2072:

> "Appellant first contends that Section 43 and related Sections 41 and 45 of the New York Civil Rights Law, as applied to appellant offends the due process clause of the Fourteenth Amendment as an interference with its right of selection to membership and abridgement of its property rights and liberty of contract. We have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees.
>
> "To deny a fellow-employee membership because of race, color or creed may operate to prevent that employee from having any part in the determination of labor policies to be promoted and adopted in the industry and deprive him of all means of protection from unfair treatment arising out of the fact that the terms imposed by a dominant union apply to all employees, whether union members or not. * * *"

See, also:

Steele v. Louisville & N. R. Co., (1945) 323 U. S. 192, 65 S. Ct. 226;

Brotherhood of Locomotive Firemen & Enginemen, 1945) 323 U. S. 210, 65 S. Ct. 235;

Graham v. Brotherhood of Firemen, (1949) 338 U.S. 232, 70 S.Ct. 14;

Brotherhood of Railroad Trainmen v. Howard, (1951) 343 U. S. 768, 70 S. Ct. 14.

From a procedural point of view, the bill provides for notice, hearing, and judicial review, which, if properly followed in administration, would comply with due process requirements. The provisions of the proposed bill are similar to the enforcement provisions of Ch. 101, Stats., which have been repeatedly upheld. The fact that a labor organization is involved would not alter the general rules as to the kind of procedure which would meet the rules of due process.

Very truly yours,

STEWART G. HONECK
Attorney General

CAPTION:

Bill 327, S., if enacted, would alter the law applied in Ross v. Ebert, 275 Wis. 523; and would be constitutional.

CONSTITUTIONAL LAW
Presidential Powers—Georgia

The Attorney General of Georgia has furnished the Governor of Georgia a memorandum concerning the power and authority of the President of the United States to use armed forces of the United States in connection with the enforcement of federal court orders. The opinion deals specifically with developments in the case of Little Rock, Arkansas (see 2 Race Rel. L. Rep. pp. 931-965). Attorney General Cook concludes that the action of the President was unconstitutional. [For a background study on "Enforcement of Court Orders" including troop use see 2 Race Rel. L. Rep. 1051-1080 (1957)].

MEMORANDUM

To: Honorable Marvin Griffin, Governor of Georgia

From: Eugene Cook, Attorney General of Georgia

Subject: Authority of the President to use Federal Troops in a State of the Union

On September 24, 1957, President Eisenhower ordered the Arkansas National Guard into federal service and occupied Central High School of Little Rock with storm troopers of the regular Army. Naked bayonets were held against the throats of teenage girls and American blood was spilled upon the soil of a sovereign State by a posse comitatus under orders of the President of the United States.

Airborne troops of the regular Army landed in Arkansas for the purpose of preventing domestic violence without any request from the Legislature or from the Governor of that State.

Did the President of the United States have the authority under the Constitution of the United States and laws of Congress to take such action?

Article IV, Section 4 of the United States Constitution provides as follows:

> "Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature or of the Executive (when the Legislature cannot be convened) against domestic Violence."

It will be seen that the Constitution only authorizes the United States to take protective action against domestic violence in any State on application of the Legislature, or of the Executive. This section of the Constitution has been construed in a number of cases, none of which are identical with the Little Rock situation, but there are several Supreme Court decisions which call attention to the fact that the United States can only intervene to suppress violence in a State on application of the Legislature or of the Executive of that State.

U. S. v. Cruikshank, 92 U.S. 542, 23 L. Ed. 529, involved one of the Civil Rights Acts of 1870. An indictment was brought under this act to put down a conspiracy of the Ku Klux Klan to intimidate negroes in the exercise of rights granted to them by the Fourteenth Amendment of the United States Constitution. The Court held the law unconstitutional and dismissed the proceeding, saying:

> ". . . The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a State. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a state cannot protect itself against domestic violence, the United States may, upon the call of the Executive, when the Legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution, article IV, §4; but applies to no case like this."

In the earlier case of Luther v. Borden, 7 How. 1, 42, 45, 12 L. Ed. 581, 599-601, the Supreme Court made the following statements with reference to the law on this subject:

> ". . . . The first clause of the first section of the Act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a State government. The power given to the President in each case is the same, with this difference only; that it cannot be exercised by him in the latter case, except upon the application of

the Legislature or executive of the State.
". . . The State itself must determine what degree of force the crisis demands."

In his address to the nation on September 24, 1957, the President stated that "disorderly mobs" have deliberately prevented the carrying out of proper orders from a federal court. He then stated that for this reason "it becomes necessary for the Executive Branch of the federal government to use its powers and authority to uphold federal courts." The means of carrying out the orders of courts are provided by the laws of Congress. The remedies are both civil and criminal. Specifically, whenever the federal court issues an injunction, any person violating the injunction is subject to civil or criminal contempt of court. He may be arrested by the United States Marshal, or other law enforcement officer, brought before the court and subjected to fine or imprisonment or both in the discretion of the court whose order has been violated. Title 28, Sections 547-549 of the United States Code places the responsibility for carrying out the orders and decrees of the United States Courts on the Marshals of these courts, and permits them to secure all assistance necessary for such purpose. In the Little Rock case no attempt whatever was made to carry out the orders of the court in the normal manner provided by law.

[*Title 10 U.S.C. §3500*]

The authority of the President to call the National Guard into federal service is contained in Section 3500 of Title 10 of the United States Code, the relative portions of which read as follows:

"§3500. Army National Guard in Federal Service; call
"Whenever—
"(1) the United States, or any of the Territories, Commonwealths, or possessions, is invaded or is in danger of invasion by a foreign nation;
"(2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or
"(3) the President is unable with the regular forces to execute the laws of the United States;
"the President may call into Federal service members and units of the Army National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States. . . ."

None of the three conditions set forth in the foregoing section of the United States Code existed in the Little Rock, case. There was no danger of invasion, there was no rebellion or danger of rebellion, and there is no pretense that the President was unable with the regular forces to execute the laws of the United States. In any event, orders for a call of the Arkansas National Guard into federal service *were not issued through the Governor of the State* as required by the foregoing section of the United States Code.

[*Title 10, U.S.C. Chap. 15*]

While 10 U.S.C. §§332 and 333 state instances in which the President could use the militia, these Sections do not attempt to provide the manner for calling the National Guard into federal service. These Sections are necessarily dependent upon 10 U.S.C. §3500 as to the manner of call, i.e., through the Governor of the State. If Sections 332 and 333 should be said to be in conflict with Section 3500, the latter provision being later in point of time must prevail.

[*Posse Comitatus*]

The President violated the provisions of 10 U.S.C. 3500, above quoted by his failure and refusal to act through the Governor of the State as required by that statute. He also violated another Act of Congress which forbids the use of the Army as a "posse comitatus" to quell local disorders. Title 18, Sec. 1385 of the United States Code reads:

"§1385. *Use of Army and Air Force as posse comitatus*
"Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

"Posse comitatus" is defined as a group of citizens called upon by the civil authorities to

assist in maintaining peace and order. The quoted section of the U. S. Code prohibits the use of the Army for this purpose.

The President's address of September 24, 1957, terms the incident at Little Rock as a case of "mob rule" and the tenor of his speech does not suggest that there is any rebellion or danger of a rebellion in that city. Riots and insurrections and mob violence do not fit the definition of "rebellion." The Supreme Court of the United States made this clear in the case of Amy Warwick, 17 L. Ed. 459. In that case it was said:

> "It is no loose unorganized insurrection, having no defined boundary or possession."

The substance of the Little Rock case is that troops were called out to enforce the segregation decision of a District Court of the United States. The President's speech makes it clear that he ordered the use of troops to carry out a court order for the de-segregation of the Little Rock schools in accordance with the Supreme Court's interpretation of the Fourteenth Amendment of the United States Constitution. In his proclamation of September 23, the President stated that the action of certain persons and assemblages of persons were impeding justice in a way which denied the colored citizens the equal protection of the laws and as authority for his later action in sending troops to quell the disturbances in Little Rock he cited sections 332 and 333 of Title 10 of the United States Code. Section 332 is merely a codification of an Act of Congress passed on July 21, 1861, for the purpose of calling the militia into federal service to put down the rebellion of the South in the War Between the States. Section 333 is a codification of an Act of Congress passed during the days of reconstruction. 10 U.S.C. 333 reads as follows:

> "§333. *Interferences with State and Federal law*
> "The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—
> "(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or
> "(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.
> "In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution."

10 U.S.C. 332 reads as follows:

> "§332. *Use of militia and armed forces to enforce Federal authority*
> "Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion."

The first paragraph of §333 quoted above involves the execution of the laws of the State and of the United States, but no laws of Arkansas are involved in the President's Proclamation. His Proclamation is therefore based on the second paragraph of the section just quoted. This section of the Judicial Code is obviously in conflict with Article 4, Section 4 of the United States Constitution which as stated above allows federal intervention against domestic violence only when an application has been made of the Legislature or by the Executive of the State. The facts of the matter show that there has been no opposition or obstruction in the execution of the laws of the United States in Little Rock and that nothing has been done to impede the course of justice under those laws. There is no claim that any officer or agent of the United States has been prevented from carrying out any of the laws of the United States or that any person or group of persons have impeded or interfered with any officer of any court of justice in carrying out the laws of the United States. It is true that individuals and groups of persons have assembled to intimidate negroes from entering the Little Rock High School, and sporadic acts of violence have taken place on

or about the school grounds for this purpose, but these persons are in no way connected with the administration of justice in the federal court at Little Rock.

The accusation against these unorganized groups of Little Rock people is that they were obstructing the execution of the laws of the United States by interfering with the federal court's order for the integration of the public schools, then the accusation must fall because a decision of the court is not a law.

[*Definition of "Laws"*]

Article 1, Section VIII, Clause 15, of the United States Constitution provides as follows:

> "Call out the militia. To provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel Invasions;"

The Act of February 28, 1795, which delegated to the President the power to call out the militia, was held to be constitutional in Martin v. Mott, 12 Wheat. 19, 32 (1827).

What are "the laws of the Union"? The phrase "the Laws of the Union" has the identical meaning as the phrase "the law of the land", which is defined in Article VI as "this Constitution, and the laws of the United States which shall be made in pursuance thereof;" (and treaties). A decision of the Supreme Court of the United States or any other federal court is excluded by the definition itself. Article III of the Constitution provides that the judicial power of federal court may not extend to any *case* arising under federal "law", unless that law be "this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their authority".

No federal or state court of record in America has ever held that a decision of the Supreme Court of the United States or that of any other federal court is "the law of the land" or "the Law of the Union". Such decision is never anything more than *the law of the case* actually decided by the court and binding only upon the parties to that case and no others. As was said by Charles Warren, in his History of the Supreme Court, p. 748, Vol. 2:

> "However the court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."

This also disposes of the President's claim that he is using troops in accordance with his duty to "take care that the Laws be faithfully executed" as provided in Article II, Section 3 of the Constitution. Obviously this article of the Constitution means that the laws must be executed as required by other constitutional provisions, such as the one that demands a request from the Legislature or the Governor of the State before troops are used to put down domestic violence (Art. IV, Sec. 4).

[*Provisions of Criminal Code*]

If the charge against the Little Rock people is that they have impeded the course of justice under the laws of the United States, as specified in 10 U.S.C. 333, then this accusation is also without legal foundation. The United States Code specifies in detail those acts which amount to obstruction or impediment to the administration of justice. Acts which amount to an obstruction of justice are set forth in Title 18, Sections 1501 to 1507 inclusive of the United States Code. These acts include assault on a process server, resistance to an extradition agent of the United States, influencing or injuring an officer of the court, a juror or witness in a pending proceeding, theft or alteration of court records, and picketing a court with the intent of influencing a judge, juror, witness, or other officer in the discharge of his duty. It is not contended that any member of the group assembled at the Little Rock High School was engaged in any of the acts which the United States Code enumerates as an act constituting an obstruction to justice. The President of the United States was therefore in error in basing his proclamation for the use of Army troops on the questionable provisions of Sections 331 to 334 inclusive of the United States Code.

[*Civil Rights Act of 1957*]

He might have based his order upon other "Civil Rights" provisions of the United States Code if these provisions had not been repealed by the Civil Rights Act of 1957 which was passed at the last Session of Congress and approved by the President.

Public Law 85-315, 71 Stat. 634, known as the "Civil Rights Act of 1957", passed in the 85th Congress and approved by the President on September 9, 1957, contains the following provision:

"Sec. 122. Section 1989 of the Revised Statutes (42 U.S.C. 1993) is hereby repealed."

42 U.S.C. 1993, which was thus repealed by the Civil Rights Act of 1957, reads as follows:

"§ 1993. *Aid of military and naval forces*
"It shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as may be necessary to aid in the execution of judicial process issued under sections 1981-1983 or 1985-1992 of this title, or as shall be necessary to prevent the violation and enforce the due execution of the provisions of sections 1981-1983 and 1985-1994 of this title. R.S. §1989."

The above quoted section of the United States Code is one of the reconstruction acts passed by Congress on April 19, 1866, for the purpose of enforcing the Civil Rights Laws that were enacted following the Civil War. The sections of the Code referred to in the above quoted provision which was recently repealed constitute all of the Civil Rights provisions of the United States Code which are now written upon the statute books of this nation. It is therefore inescapable that Congress in its last session intended to take away from the President of the United States any authority which he may have previously had to make use of the Army or militia to enforce orders of any federal court relating to the Civil Rights of individuals. Irrespective of the intent of Congress as expressed in this recent law, the President called out federal troops under the authority of other provisions of the Code relating to the obstruction of justice, which articles are wholly inapplicable to the situation as demonstrated above.

CIVIL RIGHTS

At the bottom of the Little Rock trouble lies the precipitate and arbitrary action of an imported northern judicial integrationist whose court injunction prohibited the Governor of Arkansas from using State troops to prevent rioting and domestic violence. While this injunction merely prohibited the Governor from exercising his sworn duty to maintain the public peace, its purpose was to compel the City of Little Rock to integrate its schools with white and negro students against the will of the great majority of the people of the city and State. When the troops were withdrawn local and state police were substituted for the militia and the negroes under their protection entered the school. At this juncture citizens of Little Rock appeared separately, or in small groups, to protest and endeavor to prevent the negroes from remaining in the school. They were unarmed and unorganized and the only acts of violence that occurred were of a minor nature. Fists and feet were the only weapons employed. These people were not under injunction to integrate the school, nor were they in any sense parties to any judicial proceeding for that purpose. Before the local and state police were given the minimum opportunity to preserve order federal troops appeared. Their job—integrate the school, furnish a military escort for the negroes, beat down with rifle butts and bayonets—bullets if necessary—any and all groups of people who gathered at the school, peaceably or otherwise, to protest this violent action against the sovereign rights of the State of Arkansas.

[*Scope of 14th Amendment*]

During the first Tragic Era of Civil War Reconstruction, a vindictive Congress passed many so-called "Civil Rights Laws" directed at the defeated and prostrated South. Most of these laws were declared unconstitutional by the Supreme Court, and the remainder were largely abandoned because they were considered, by analogy, to be equally unconstitutional and illegal—yet the basis for the proclamation of President Eisenhower and his order for Army aggression against the State rest on these unconstitutional statutes. Section 333 of Article 10 of the United States Code, relied upon by the President, by its very terms is one to enforce the Fourteenth Amendment guarantee against *State action* denying "equal protection of the laws." In the Little Rock case this enforcement was directed not at State action but at the individual action of private citizens who held no office in, and had no authority to act for the State of Arkansas.

The Supreme Court of the United States has on scores of occasions ruled that the Fourteenth Amendment does not govern the actions of private citizens and applies only to State action by state officials in the enforcement of state laws that deny equal protection of the laws by racial or other discrimination.

In the case of U.S. v. Cruikshank, 92 U.S. 542, referred to above the defendant was a member of the Ku Klux Klan of Louisiana, and was charged with having gone on the public highways in disguise with other members of the Klan for the purpose of carrying out a conspiracy to intimidate negroes and deprive them of their Civil Rights in violation of the Fourteenth Amendment and the Civil Rights Acts of Congress. The Court held:

> "The 14th Amendment adds nothing to the rights of one citizen against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen."

The Court held that the United States had no constitutional power to declare the actions of the Klan to be a crime. In this connection Mr. Chief Justice Waite said:

> "Sovereignty for this purpose rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state, than it would be to punish for false imprisonment or murder itself."

If the United States has no authority to put down or punish roving bands of Klansmen doing violence to the Civil Rights of negroes under the cover of hooded robes, by what law or rule of reason can it disperse with rifles and bayonets unmasked and unorganized groups of citizens appearing in the daylight hours to protest an invasion of federal troops into their local territory?

[*Civil Rights Cases*]

In the Civil Rights cases, 109 U.S. 3, 27 L. Ed. 836, the Supreme Court dismissed cases under the Civil Rights Act brought from the States of Kansas, California, Missouri, New York and Tennessee. The defendants were accused of discriminating against negroes on account of their race and conspiring to deprive them of their rights under the Fourteenth Amendment and the Acts of Congress enforcing its provisions. The Court again emphasized that the United States has no power to punish an invasion of rights under the Fourteenth Amendment by individual citizens or groups of citizens.

The citizens of Little Rock have violated no law of the United States when they assemble to protest either the integration of their schools, or the unlawful invasion of their city by Federal armed force. Just the other day Stanley Reed, retired justice of the Supreme Court and one of the nine who handed down the desegregation decision in 1954, stated in a speech to the California Bar Association that criticism of the decisions of the Supreme Court "is one thing that the First Amendment does not forbid."

The Civil Rights cases have been frequently reaffirmed by the Supreme Court and have never been overruled.

The President would use the Fourteenth Amendment and the Civil Rights Acts to centralize federal power in Washington but the Supreme Court plainly says these laws are not to be used for such purpose.

Mr. Justice Frankfurter is certainly no segregationist, but in the case of Stefanilli v. Minard, 342 U.S. 117, 96 L. Ed. 138, he emphasized:

> " . . . Only last term we reiterated our conviction that the Civil Rights Act 'was not to be used to centralize power so as to upset the federal system.' . . . "

When the President thus abuses his powers against a sovereign state, he is not guaranteeing that state a "Republican form of government" as required by Article 4, Section 4 of the Constitution.

It is hardly necessary to refer to other court decisions on this subject. These are sufficient to show that the Fourteenth Amendment gives neither Congress nor the President the power or authority to compel individual citizens or groups of citizens to integrate the white and colored races. Congress alone has power under this Amendment and its power is limited to prohibiting a state or state laws from discriminating against any person, white or black, on account of race or color.

[*10 U.S.C. 333 Unconstitutional*]

So we come back again to Section 333 of Title 10 of the United States Code relied on by the President as his authority for sending United States troops into Arkansas. The first paragraph of that statute says that whenever the constituted authorities of a state are unable to protect, or fail or refuse to protect any part or class of people from domestic violence or conspiracy

which may deprive them of rights or privileges named in the Constitution and secured by the laws of the State and the United States, "the State shall be considered to have denied the equal protection of the laws secured by the Constitution." This statute obviously conflicts with the Fourteenth Amendment which is directed at State action, and not at the inability of the state to act or its failure or refusal to act.

Congress certainly has no power to rewrite the Constitution by statutory definition. The Fourteenth Amendment prohibits state action only. State inaction is the opposite of state action and cannot be converted into the latter through the actions of lawless individuals whose acts are nowhere included in the Amendment.

[*Effect of School Cases*]

In today's hysteria over racial relationships prevailing over the Northern and Western portions of the nation, the politicians, the do-gooders and portions of the brain-washed populace have lost sight of the plain meaning of the Fourteenth Amendment and of the school segregation decision of the Supreme Court. Neither the Amendment nor the Black Monday decision which gave it a sociological metamorphosis require integration. They merely prohibit *State action* which would discriminate against any person on account of race or color. This point is well emphasized in the opinion of a three-judge court in Briggs v. Eliott, 132 F. Supp. 777 (1955).

The Briggs case was later cited with approval by the United States Court of Appeals of the Fifth Circuit in Avery v. Wichita Falls Independent School District (1957) 241 F. 2d 230, 233.

Despite these rulings of the courts federal troops have been sent to Little Rock to compel integration in its public school. Law and order seem to be giving way to armed force with the sanction of Presidential Proclamation alone.

In our national negro hysteria another misconception of law is being broadcast by radio, television, and the public press. This subversion of legal principle appears in oft repeated statements that the school segregation decision of the Supreme Court is the "Supreme Law of the Land". As shown hereinabove the decision is nothing more than the law of the case. The Constitution makes it clear that even a Supreme Court decision is not the Supreme Law of the Land. Article VI of the United States Constitution thus defines the Supreme Law of the Land:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ."

It will be seen that the Constitution does not include decisions of the Supreme Court in its definition of the Supreme Law of the Land. This is quite understandable in view of Mr. Justice Robert's famous remark that a "Supreme Court decision is like a one-way ticket—good for that day and that trip only."

THE POLICE POWER

If the people of Little Rock assembled to threaten or intimidate or even to do violence to negroes who entered the high school that had been set aside for white students only, they were guilty of a breach of the peace, assault and battery, or some other act violative of peace and order in the city. The punishment or prevention of such actions is the sole prerogative of the state under its police power. The Federal Government has no inherent police power because the states have never surrendered such powers to the Federal Government. The Supreme Court has so ruled on numerous occasions.

The Fourteenth Amendment does not take from the states their inherent right to quell disorder and prevent local violence. The Supreme Court has specifically said so in Barbier v. Connolly 113 U.S. 27, 28 L. Ed. 923.

The Federal Government has no jurisdiction to legislate or otherwise interfere in state matters relating to public safetv, health or good order. The state and not the United States has the power and jurisdiction to quell local disorders.

STATES RIGHTS

There are many recent Supreme Court decisions which seem to have the effect of obliterating from the Constitution every provision that would reserve to the states their rights to local liberty and local self-government. The Court apparently disregards the Constitution in those cases where the necessary result of fol-

lowing it would do violence to the personal philosophy or political beliefs of the individual judges. However, there are other decisions of the Court, quite numerous, which do honor to the basic law as it is written.

The first ten amendments to the United States Constitution constitute the Bill of Rights and are a sacred cornerstone of the liberties of individuals and of the fundamental rights of the states. Our political history as a nation records the fact that the original thirteen states refused to ratify the Constitution until these amendments were added to it. Two of these provisions of the Bill of Rights guarantee freedom of local self-government.

[*Ninth Amendment*]

The Ninth Amendment limits the authority of the Federal Government to those rights enumerated in the Constitution and reserves all others to the states. It reads:

> "*Article IX.*—The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The foregoing provisions of the Ninth Amendment are repeated with greater emphasis and in different verbiage in the Tenth Amendment. The language of the latter amendment is plain and unambiguous.

> "*Article X.*—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Soon after the Civil War had ended Chief Justice Chase rendered a decision which emphasized the fact that the very existence of our republican form of government depended upon an observance of these articles of the Bill of Rights. Texas v. White (1868) 74 U.S. 700, 725, 19 L. Ed. 237.

The forbearance of the Federal Executive and of the Federal Courts in race riots and insurrections in Northern cities is well known. The Supreme Court in 1951 had occasion to pass upon the right of the State of Illinois to penalize the publication of inflammatory statements exposing the citizens of any race to contempt on account of their race or color. Four members of the Court thought that the guaranty of free speech contained in the First Amendment to the Constitution of the United States prohibited this action, but the majority held that such actions tending to bring about local violence and disorder were appropriately subject to the police power of the state. In rendering the Court's opinion in this case, Beauharnais v. Illinois (1951) 343 U.S. 250, 259-267, 96 L. Ed. 919, 928-932, Mr. Justice Frankfurter said:

> ". . . From the murder of the abolitionist Lovejoy in 1837 to the Cicero Riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. . . . Nine years earlier, in the very city where the legislature sat, what is said to be the first northern race riot had cost the lives of six people, left hundreds of Negroes homeless and shocked citizens into action far beyond the borders of the State. Less than a month before the bill was enacted, East St. Louis had seen a day's rioting, prelude to an outbreak, only four days after the bill became law, so bloody that it led to Congressional investigation. A series of bombings had begun which was to culminate two years later in the awful race riot which held Chicago in its grip for seven days in the summer of 1919. Nor has tension and violence between the groups defined in the statute been limited in Illinois to clashes between whites and negroes.
>
> ". . . The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish. . . ."

It may here be noted that the bombings and bloodshed in Chicago in 1908 and 1817 and in East St. Louis in 1919 did not compel the then President of the United States to invade these cities with Federal troops. The Court's opinion in the Beauharnais case then makes the following philosophical reflections which it conveniently forgot three years later when the School Segregation cases were decided:

> "It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial

and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color, or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues. 'The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.' Anderson v. Dunn (US) 6 Wheat. 204, 226, 5 L. Ed. 242, 247. Certainly the Due Process Clause does not require the legislature to be in the vanguard of science—especially sciences as young as human ecology and cultural anthropology. See Tigner v. Texas, 310 U.S. 141, 148, 84 L. Ed. 1124, 1128, 60 S. Ct. 879, 130 ALR 1321.

". . . It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. . . ."

The concluding paragraph of Mr. Justice Frankfurter's opinion in the Illinois case is also quite interesting:

"We find no warrant in the Constitution for denying to Illinois the power to pass the law here under attack. But it bears repeating—although it should not—that our finding that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or of its efficacy. These questions may raise doubts in our minds as well as in others. It is not for us however, to make the legislative judgment. We are not at liberty to erect those doubts into fundamental law."

It was at this same term of court in 1951 that the same Justice made the remark:

"Only last term we reiterated our conviction that the Civil Rights Act was not to be used to centralize power so as to upset the Federal system."

CONCLUSION

The President's act of Federalizing the Arkansas National Guard and sending airborne troops of the regular Army to occupy Central High School was a deliberate and palpable executive encroachment of the Constitution and of the Congress itself. Such an encroachment will of necessity lead to the end of constitutional government, i.e., "an indestructible union composed of indestructible states."

It is a cardinal principle of government that when law ends, tyranny begins. The present strength of these usurpers will not deter us in our opposition to such tyranny. Tom Paine aptly stated this over one hundred eighty years ago when he said—"Tyranny like hell, is not easily conquered; yet we have this consolation with us, that the harder the conflict, the more glorious the triumph."

This the 17th day of October, 1957.

s/ Eugene Cook
Attorney General of
Georgia

FEDERAL JUDICIAL POWER

A Study of Limitations—III

In earlier issues of the Race Relations Law Reporter, a series of studies defining the scope of Federal court jurisdiction has been presented. The first was an examination of the authorized area of action of the United States courts, in which the affirmative bases of federal jurisdiction most likely to be invoked in race relations cases were discussed. 2 Race Rel. L. Rep. 269 (1957). Subsequently, attention has been given to factors which may limit the exercise of the federal judicial power, even within the scope of the general area of federal jurisdiction. See *Exhaustion of Administrative Remedies*, 2 Race Rel. L. Rep. 561 (1957), discussing the doctrine that a litigant must first seek relief through available administrative remedies before resorting to the federal courts; *The Eleventh Amendment*, 2 Race Rel. L. Rep. 757 (1957), outlining the nature of the limitations which that amendment places on the federal judicial power. The requirement that certain controversies which would ordinarily be heard in the regularly constituted federal district courts must be decided by a special three-judge court was set out in an earlier issue, 1 Race Rel. L. Rep. 811 (1956).

The present study is designed to pursue this general theme further by investigating two additional factors which bear on the scope of federal court jurisdiction: First, the question of whether a litigant shall be required to exhaust state judicial remedies before resorting to the federal courts; and second, the extent to which the federal judiciary will voluntarily restrict the exercise of its own jurisdiction under the doctrine of equitable abstention.

I. Exhaustion of State Judicial Remedies

Where both federal and state courts may take cognizance of the issue involved in a particular case, the federal courts have tended to postpone or relinquish the exercise of their jurisdiction to enjoin state officials and to entertain certain other cases. Moore, *Judicial Code* 400 (1949). In race relations cases the plaintiff is normally seeking to vindicate or protect rights secured by the Federal Constitution or statutes, and, although the state courts have concurrent jurisdiction to protect or vindicate these rights, the plaintiffs generally prefer to seek their relief in the federal courts. The extent to which the federal courts will decline their concurrent jurisdiction where the plaintiff has a state court remedy is the subject of this study.

It is to be noted that several sections of the Judicial Code (Title 28, U.S.C.) require plaintiffs to exhaust their state judicial remedies before seeking the aid of federal courts. These sections deal with cases involving state "rate" orders which do not affect interstate commerce (28 U.S.C.A. § 1342) and the assessment, levy and collection of state taxes (28 U.S.C.A. § 1341). Further, where the petitioner is seeking a writ of habeas corpus, considered *infra*, the Judicial Code requires exhaustion of available state remedies (28 U.S.C.A. § 2254). These sections have altered the case law considered herein in many instances, but the cases decided prior to the enactment of these sections are applicable to those situations not covered by the Judicial Code.

Distinction Between Judicial and Administrative Remedies

A distinction is drawn by the courts between state remedies which are administrative or legislative in nature and those which are tra-

ditionally judicial. In general, the rule is that the plaintiff in the federal action will be put to the necessity of exhausting his state administrative or legislative remedies (see *Exhaustion of Administrative Remedies, supra,*) whereas if the remedy is traditionally judicial in nature, he is under no necessity to seek redress in the state courts. *Lane v. Wilson,* 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939); *Dyer v. Kazuhisa Abe,* 138 F.Supp. 220 (D. Hawaii 1956). See, however, the discussion of the doctrine of equitable abstention, *infra.*

Development of the Doctrine

The leading case pointing up the distinction which is drawn between administrative and judicial remedies provided by state law, and the effect of this distinction on the requirement that plaintiff exhaust his state remedies is *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908). In that case Virginia had established a State Corporation Commission to determine and fix just and reasonable rates for intrastate railroad service and the state statute allowed the railroad an appeal to the Supreme Court of Appeals of Virginia. The state court had the power to substitute its decision for that of the commission, and it could fix and determine the rates which would be charged by the intrastate railroads upon appeal from the commission's decision. The railroad sought an injunction in the federal court to enjoin the commission from enforcing certain passenger rates which it claimed were confiscatory and violative of the due process clause of the Fourteenth Amendment. In the opinion, Mr. Justice Holmes stated:

> "The State of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission. . . . It seems to us only a just recognition of the solicitude with which their [the railroad's] rights have been guarded, that they should make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States." 211 U.S. at 230.

The phrase "final legislative action" refers to the right of the plaintiff to appeal to the Supreme Court of Appeals of Virginia, which court was held to be performing a legislative function in that it had the power to fix finally the rates which were to be charged by the railroad. Mr. Justice Holmes reasoned from the habeas corpus cases, observing that "considerations of comity and convenience" had led the court to decline in the ordinary case to interfere when the petitioner had open to him a writ of error to the highest court of a state, although there was no merely logical reason for doing so. (211 U.S. at 229). Dictum in the case points out that the railroad was not bound to wait for proceedings brought to enforce the rate and to punish it for departing therefrom before seeking relief in the federal courts. (211 U.S. at 228).

Following this decision several cases clarified the doctrine laid down in the *Prentis* case. *Bacon v. Rutland R. R. Co.,* 232 U.S. 134, 34 S.Ct. 283, 58 L.Ed. 538 (1914) and *Gilchrist v. Interborough Rapid Transit Co.,* 279 U.S. 159, 49 S.Ct. 282, 73 L.Ed. 652 (1929). In these cases the distinction between administrative and judicial remedies was used to determine whether the plaintiffs would be required to exhaust their state remedies before proceeding to question the establishment of intrastate rates in the federal courts. In the *Bacon* case Mr. Justice Holmes said that where the state statute did not attempt to confer "legislative powers" upon the courts to which plaintiff could appeal, but merely provided "an alternative and more expeditious means" of doing what might otherwise be accomplished by a bill in equity, the remedy was purely judicial in nature, and the plaintiff was free to assert its rights in the federal courts without first exhausting the remedies provided by the state. In the *Gilchrist* case, it was held that the state remedies were administrative, and therefore, under the doctrine of the *Prentis* case, the plaintiff was required to exhaust those remedies before invoking the jurisdiction of the federal courts. Dictum in that case indicated that under special circumstances the plaintiff would be put to the necessity of exhausting his state judicial remedies, but in the absence of such circumstances, there would be no need for the plaintiff to do so.

Present Doctrine Stated

The next important development came in 1939, with the Supreme Court's decision in *Lane v. Wilson,* 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281, which succinctly stated the doctrine

in its present form. Plaintiff, a Negro, alleged that he had been denied the right to vote by registration officials, solely on the basis of race or color under an unconstitutional provision of the registration act, and sought to recover damages under the Civil Rights Act (42 U.S.C.A. § 1983). The registration statute provided for review by the state court in any case where registration was denied, but the appellate court did not have the right to register the party complaining of such denial and could not substitute its order for that of the registrars. The Supreme Court allowed the plaintiff to maintain his action without resorting to the remedies provided by state statute, declaring:

> "To vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. Normally, the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had. . . . Barring only exceptional circumstances [citations omitted] or explicit statutory requirements [citations omitted], resort to a federal court may be had without first exhausting the judicial remedies of state courts." 307 U.S. at 274.

The difference in the exhaustion requirements is based on the premise that until a party has pursued his administrative remedies, it is not certain that he needs judicial relief, because the administrative agency may fully sustain his claims. See *Trudeau v. Barnes*, 65 F.2d 563, 564 (5th Cir. 1933). However, once a party is recognized to have a cause appropriate for judicial determination, in the area in which the state and federal courts have concurrent jurisdiction, he may bring his suit in whichever court he chooses.

Factors Indicating Nature of Remedy

Although the opinions of the federal courts frequently are not clear as to the factors which influence their decision in drawing the distinction between administrative and judicial remedies, *Mitchell v. Wright*, 62 F.Supp. 580 (M.D. Ala. 1945), *rev'd*, 154 F.2d 924 (5th Cir.), *cert. denied*, 329 U.S. 733, 67 S.Ct. 96, 91 L.Ed. 633 (1946), a "registration" case, indicates the factors which may be considered. In this case an Alabama statute provided for an appeal from the board of registrars to the circuit court of Macon County, thence to the Supreme Court of Alabama. In reaching the decision that the appellate process was of an administrative nature, the district court emphasized the fact that if the appellate court should find that the complainant has been improperly denied the right to register, his registration would take effect retroactively as of the date of his application to the board of registrars. The Fifth Circuit, in reversing the district court, set forth clearly the factors which it considered important in determining whether the courts were exercising an administrative or judicial function, as follows:

> "It is true that, under the laws of Alabama, any person denied registration has the right to appeal to the proper circuit court of that state, thence to the Supreme Court; but the remedy so provided is not deemed by us to be purely of an administrative nature; it is of the type of proceeding traditionally considered judicial. The aggrieved party may go into the state circuit court, which is a judicial court of general jurisdiction of law and equity. . . . A trial by jury is provided, and the court is required to charge the jury as to the qualifications of voters. . . . [N]either the circuit court nor the Supreme Court possesses the power to substitute its order for that of the registrars.
>
> "The Alabama circuit court has no power to register the applicant, though when its jurisdiction is invoked it may find as a fact, and adjudicate as the law, that he is entitled to registration, and though it may issue an extraordinary writ commanding the registrar particularly to obey the law and to perform the specific ministerial act of registration. These things, and the use of juries . . . are the indicia of a judicial court, not of an administrative board or office; the final judgment of such a court is res judicata." 154 F.2d at 926.

The concurring opinion stated that the factors which must be considered are "the element of futurity or retrospect, that of generality or particularity, that of discretion, and that of initiation." (154 F.2d at 928).

The emphasis of the *Mitchell* and *Prentis* decisions seems to rest on the factor of whether the state court may substitute its "legislative" order or regulation for that of the administrative agency.

Additional considerations bearing on the classification of administrative (or legislative) functions and judicial functions have been indicated by the Supreme Court. In the *Prentis* case, Mr. Justice Holmes observed:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." 211 U.S. at 226.

Further, in *Lane v. Wilson, supra,* Mr. Justice Frankfurter, classifying the proceeding open to the plaintiff as judicial, noted that in it the state courts do not have "any of the discretionary or initiatory functions that are characteristic of administrative agencies." 307 U.S. at 274.

Race Relations Cases

In recent race relations litigation, federal courts have again had occasion to draw the distinction between administrative and judicial remedies, and to reiterate the principle that the plaintiff is not required to exhaust state judicial remedies. *McDonald v. Key,* 224 F.2d 608, 1 Race Rel. L. Rep. 207 (10th Cir.) *cert. denied,* 350 U.S. 895, 76 S.Ct. 153, 100 L.Ed. 787 (1955); *Carson v. Warlick,* 238 F.2d 724, 2 Race Rel. L. Rep. 16 (4th Cir. 1956), *cert. denied,* 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed.2d 664, 2 Race Rel. L. Rep. 300 (1957); *Robinson v. Board of Educ. of St. Mary's County,* 143 F. Supp. 481, 1 Race Rel. L. Rep. 862 (D.Md. 1956).

OKLAHOMA

In *McDonald v. Key, supra,* plaintiff, a Negro, sought damages under the Civil Rights Acts, alleging that the State Election Board had violated his constitutional rights by adding the word "Negro" after his name on the state Democratic primary ballot. Section 2, Article 7 of the Oklahoma Constitution provides, in part, that the Oklahoma Supreme Court shall have original jurisdiction to supervise all inferior courts and "all commissions and boards created by law." In upholding the plaintiff's right to maintain his action in the federal court, the court of appeals, basing its decision on *Lane v. Wilson, supra,* said,

> "The relief provided by such § 2 is clearly of a judicial nature. We know of no purely administrative remedy that was open to the plaintiff." 224 F.2d at 610.

NORTH CAROLINA

Plaintiff, in *Carson v. Warlick, supra,* sought a writ of mandamus to require the federal district court to vacate an order staying proceedings in the case until plaintiffs had exhausted their administrative remedies under the North Carolina "School Placement Act" [1 Race Rel. L. Rep. 240, 939 (1956)], and to allow plaintiffs to file supplemental pleadings and to proceed with the case "as though the Pupil Enrollment Act had never been enacted." The court of appeals, per Circuit Judge Parker, refused to grant the writ, saying that the statute was not unconstitutional on its face, and that the plaintiffs must first exhaust their administrative remedies. In referring to the exhaustion of judicial remedies the court said:

> "It is clear, however, that the appeals to the courts which the statute provides are judicial, not administrative remedies, and that, after administrative remedies before the school boards have been exhausted, judicial remedies for denial of constitutional rights may be pursued at once in the federal courts without pursuing state court remedies." 2 Race Rel. L. Rep. at 20.

MARYLAND

In *Robinson v. Board of Educ. of St. Mary's County, supra,* plaintiffs, Negro school children, brought a class action under the Civil Rights Acts against school officials, seeking to require their admission to public schools without regard to race or color. The court, holding that it had jurisdiction, dismissed the action with leave to refile, for the purpose of allowing the plaintiffs to pursue their state administrative remedies. In discussing the exhaustion of state remedies, the court said:

> "The fact that plaintiffs might have sought a writ of mandamus in a state court, instead of filing this suit, does not deprive this court of jurisdiction. . . . No exceptional circumstances or statutory requirements prevent such resort to a federal court in this case. On the contrary, the Civil Rights Acts specifically grant such jurisdiction. [Citations omitted]." 143 F.Supp. at 489.

Exhaustion of Judicial Remedies and the Writ of Habeas Corpus

In contrast with the examples of failure to require the exhaustion of state judicial remedies just considered, the federal courts, when presented with an application for a writ of habeas corpus by a prisoner detained by state authorities, have consistently held that it is necessary, absent exceptional circumstances of peculiar urgency, for the petitioner to exhaust his available state judicial remedies.

Development of Exhaustion Rule

In one of the first significant habeas corpus cases, *Ex parte Royall*, 117 U.S. 241, 6 S. Ct 734, 29 L.Ed. 868 (1886), the court, while holding that the petitioner would be put to the necessity of exhausting all available state judicial remedies, talked in terms of the "discretion" which the federal courts should use in granting the writ:

> ". . . while the Circuit Court has the power to do so [grant the petition], and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the national Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. . . . That discretion [as to the time and mode in which the court will exert its power] should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." 117 U.S. at 251.

The Supreme Court also stated that the circuit court was not at liberty to presume that the state court would disregard the settled principles of constitutional law or that its decision would be otherwise than is required by the fundamental law of the land.

The reason for leaving the petitioner to his state judicial remedies in habeas corpus cases has been well stated by the Supreme Court in *Baker v. Grice*, 169 U.S. 284, 18 S.Ct. 323, 42 L.Ed. 748 (1898):

> "It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. . . . Unless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court." 169 U.S. at 291.

The objection to having a single federal judge deciding whether the courts of the state should try the prisoner under its laws seems to have been given much weight in all of the decisions which have considered the reasons behind the doctrine. See, for example, *Markuson v. Boucher*, 175 U.S. 184, 187, 20 S.Ct. 76, 44 L.Ed. 124 (1899). Another reason advanced by the court, found in its decision in *Ex parte Spencer*, 228 U.S. 652, 33 S.Ct. 709, 57 L.Ed. 1010 (1913) is that "if defenses may be omitted at trials, rights of review omitted, and yet availed of through *habeas corpus*, the whole course of criminal justice will be deranged and, it may be, defeated." (228 U.S. at 661.) In a word, it is more practical and more suited to justice and orderly criminal procedure to have the state courts retain jurisdiction of the matter and to determine finally the issues involved than to allow the federal courts to interfere at a premature stage in the trial procedure by the writ of habeas corpus.

It should be noted that if there is an absence of corrective process in the state judicial system, the federal courts will, in proper cases, grant the petition and not require the petitioner to resort to futile remedies or to seek nonexistent remedies. However, if the state makes the writ of habeas corpus available, a corrective process is said to be provided, and the petitioner must first avail himself of this procedure before invoking the jurisdiction of the federal courts.

> "Orderly procedure, governed by principles we have repeatedly announced, requires that before this Court is asked to issue a writ of *habeas corpus*, in the case of

a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the State may still remain open." *Mooney v. Holohan*, 294 U.S. 103, 115, 55 S.Ct. 340, 79 L.Ed. 791 (1935).

Necessity of Application for Certiorari

The earlier decisions were not clear as to whether the petitioner would be required to petition the Supreme Court of the United States for a writ of certiorari to the state court as a part of exhausting his state judicial remedies after he had obtained the decision of the highest state court. One of the first cases to indicate that the petitioner would be required to sue out a writ of error or certiorari from the Supreme Court of the United States to the highest court of the state was *In re Wood*, 140 U.S. 278, 11 S.Ct. 738, 35 L.Ed. 505 (1891), where it was said:

". . . after the final disposition of the case by the highest court of the State, the Circuit Court, in its discretion, may put the party, who has been denied a right, privilege or immunity claimed under the Constitution or laws of the United States, to his writ of error from this court, rather than interfere by writ of *habeas corpus*." 140 U.S. at 290.

The Supreme Court clarified its position in *Ex Parte Hawk*, 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 (1944), the leading case on exhaustion of state judicial remedies in habeas corpus proceedings. In that case petitioner, who had not appealed his conviction, sought release by writ of habeas corpus in the state courts and in federal courts. The court, referring to the necessity of applying for a writ of certiorari to review the decision of the highest state court, stated:

"Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted." 321 U.S. at 116-17.

The application for writ of certiorari or review by appeal was considered by the court as a part of the state remedies, and the state procedure includes review by the Supreme Court of the final decision of the highest state court.

In *Wade v. Mayo*, 334 U.S. 672, 68 S.Ct. 1270, 92 L.Ed. 1647 (1948), the Supreme Court seemed to reject its decision in the *Hawk* case, holding that the district court has discretion to determine whether the petitioner will be required to apply directly to the Supreme Court for review on the constitutional issue by certiorari or may institute an original habeas corpus proceeding in the federal district court. It gave a further explanation of its views as follows: while "considerations of prompt and orderly procedure in the federal courts" often dictated that the petitioner first seek direct review, failure to file a petition for certiorari where it was apparent that the writ would be denied without consideration of the merits of the case should not prejudice the right to file a habeas corpus application in the district court.

Exhaustion Rule Codified

In 1948 Congress codified the requirement that state remedies be exhausted before a writ of habeas corpus will be granted to a person held in custody under a state court judgment. (*Ex Parte Royall, supra*, is still controlling where habeas corpus is sought prior to a judgment of the state court.) As a result, section 2254 of the Judicial Code [62 Stat. 967, (1948), 28 U.S.C. § 2254 (1950)] now provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the state . . . if he has the right under the law of the State to raise, by any available procedure, the question presented."

It has been said that this section is declaratory of the existing law (Revisor's Note, 28 U.S.C.A., p. 723 (1950)); but the question of whether the doctrine of the *Hawk* case or that of the *Wade* case was to be applied under this statute was still present. Finally, in 1950, the

Supreme Court settled the question by reiterating the doctrine of the *Hawk* case and resolving any inconsistency between the decision in the *Wade* opinion and the requirement of applying for certiorari to the state court in favor of the requirement of certiorari. *Darr v. Burford,* 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761 (1950). The opinion in this case reviews the authorities and comes to the conclusion that comity, which was the basis for the doctrine of exhaustion of state remedies, gives rise to the rule that "lower federal courts ordinarily will not allow habeas corpus if the applicant has not exhausted his remedy in this Court by certiorari or appeal." The enactment of section 2254, it was said, was legislative recognition of the doctrine of the *Hawk* case. *Darr v. Burford, supra,* at 210. See also *United States ex rel. Auld v. Warden,* 187 F.2d 615 (3d Cir. 1951); *Goodman v. Lainson,* 182 F.2d 814 (8th Cir. 1950).

A subsidiary problem is the weight which a district court is to give to a denial of certiorari by the Supreme Court. This question was discussed in *Brown v. Allen,* 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), the majority holding that the denial of certiorari carried no substantive significance in the determination of whether habeas corpus shall be granted. See also *United States ex rel. Smith v. Baldi,* 344 U.S. 561, 73 S.Ct. 397, 97 L.Ed. 549 (1953), *separate opinion,* 344 U.S. 443, 73 S.Ct. 437, 97 L.Ed. 505 (1953) (this latter opinion, by Mr. Justice Frankfurter, is the majority opinion in both the *Brown* and *Baldi* cases on the question of whether the district court may properly give weight to the Supreme Court's denial of certiorari).

Several other recent cases construing this section of the Judicial Code are also worthy of note. *Sweeney v. Woodall,* 344 U.S. 86, 73 S.Ct. 139, 97 L.Ed. 114 (1952), involved the question of whether a fugitive from justice could bring a petition for a writ of habeas corpus in the asylum state under the exhaustion of remedies principle. The Supreme Court held that he could not do so:

> "In the present case . . . a fugitive from justice has asked the federal court in his asylum to pass upon the constitutionality of his incarceration in the demanding state, although the demanding state is not a party before the federal court and although he has made no attempt to raise such a question in the demanding state. . . .
>
> "Respondent makes no showing that relief is unavailable to him in the courts of Alabama. . . . Indeed, as a prisoner of Alabama, under the provisions of 28 U.S.C. § 2254, . . . and under the doctrine of *Ex parte Hawk, supra,* he would have been required to exhaust all available remedies in the state courts before making any application to the federal courts sitting in Alabama." 344 U.S. at 88-89.

Mr. Justice Douglas dissented on the facts. Here, the respondent was a Negro who had escaped from an Alabama jail, and he alleged that while he was held in that jail, he had been subjected to certain cruel and unusual punishment in violation of the Federal Constitution. Mr. Justice Douglas had this to say:

> "I am confident that enlightened Alabama judges would make short shrift of sadistic prison guards. But I rebel at the thought that any human being, Negro or white, should be forced to run a gamut of blood and terror in order to get his constitutional rights. That is too great a price to pay for the legal principle that before a state prisoner can get federal relief he must exhaust his state remedies. The enlightened view is indeed the other way." 344 U.S. at 92-93.

This decision has been interpreted by the second circuit as not applicable where the person petitioning for the writ of habeas corpus in another state does so for a purpose other than to challenge the right of the state from which he had fled to confine him. *United States ex rel. Smith v. Jackson,* 234 F.2d 742 (2d Cir. 1956). In this case the petitioner for the writ was a fugitive from Virginia, where he had been convicted of armed robbery. He was subsequently convicted of the commission of a felony in New York, and his sentence was based on the fact that this was his second felony conviction. In order to get the sentence reduced, he petitioned the federal district court in New York for a writ of habeas corpus, claiming that he had not been represented by counsel in the Virginia proceedings. The second circuit ruled that a hearing on the merits should be granted. That court found the rule of exhaustion of state remedies inapplicable because petitioner had not been represented by counsel in the state court proceedings and did not know about per-

fecting an appeal, and that even if the rule were to be applied, the petitioner had satisfied the requirements by seeking habeas corpus in the state of Virginia, which was denied because petitioner was not incarcerated within the state at the time when he sought the petition, and by carrying the case through the denial of certiorari in the Supreme Court of the United States. The court said that while it would be preferable for the courts of Virginia to review the conviction, such was not necessary, distinguishing the *Sweeney* case:

> "The respondent presses upon us cases involving extradition where it has been held that an escaped prisoner cannot attack by habeas corpus in the asylum state the legality of his confinement in the demanding state. [Citing *Sweeney*] But those cases do not govern this one. The denial of a remedy there meant that the prisoner would be handed over forthwith to the authorities of the state where he had originally been convicted. Thus he could then seek his remedy in the state or federal courts of that jurisdiction. Under those circumstances it was more appropriate that he seek his remedy in that fashion. In the case now before us, however, the petitioner is challenging, not the confinement which is to take place in Virginia, but his present confinement in New York. If we remit him to his Virginia remedy he will be deprived of any means of avoiding the New York penalty which flows from the allegedly unlawful Virginia conviction." 234 F.2d at 748-49. See also, *United States ex rel. Turpin v. Snyder,* 183 F.2d 742 (2d Cir. 1950).

Section 2254 provides that where there is an absence of available state post-conviction remedies or circumstances rendering such remedies ineffective to protect the rights of the prisoner, the federal courts should exercise jurisdiction. An example of the construction to be given this provision is found in cases holding that where the state remedies are inaccessible because of poverty of the petitioner, his failure to pursue those remedies will not bar him from seeking federal relief. In this situation, the courts apparently proceed upon the theory that the fact of poverty which renders the remedies inaccessible is an extraordinary circumstance which will render the post-conviction procedure of the state ineffective. See *United States ex rel. Embree v. Cummings,* 233 F.2d 188 (2d Cir. 1956); *United States ex rel. Rhyce v. Cummings,* 233 F.2d 190 (2d Cir.), *cert. denied,* 352 U.S. 854, 77 S.Ct. 101, 1 L.Ed. 2d 90 (1956).

II. The Doctrine of Equitable Abstention

Although the rule of law is generally accepted that a party is not required to exhaust state judicial remedies before seeking relief in a federal court, yet the federal courts have, during the last quarter of a century, shown an inclination to restrict the exercise of their jurisdiction voluntarily as a means of avoiding the appearances of competition between the state and federal judicial systems. This self-imposed restraint has gradually developed into what is termed the doctrine of equitable abstention. In earlier times, the traditional requirements for the exercise of equity powers—*e.g.*, that the remedy at law be inadequate—were stringently enforced, but if those requirements were met, the federal courts felt that they were obliged to take jurisdiction. Gellhorn and Byse, *Administrative Law* 275 (1954). In comparatively recent years this point of view has, to a large extent, been modified, and the federal courts, looking to the traditional concept of equity as the "exercise of sound discretion," have developed the doctrine of equitable abstention. *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Under this doctrine, the federal courts, in the exercise of their sound discretion as courts of equity, and "with a proper regard for the rightful independence of the state governments," may refuse to exercise their jurisdiction if certain "exceptional circumstances" are found in the particular case. Further, it is said that the court must look to each particular case and determine whether the exercise of its jurisdiction would be "in the public interest." *Railroad Commission of Texas v. Pullman Co., supra; Pennsylvania v. Williams,* 294 U.S. 176, 55 S.Ct. 380, 79 L.Ed. 841 (1935). See Dobie and Todd, *Federal Jurisdiction and Procedure* 779 (2d ed. 1950).

Factors Supporting Abstention

In determining whether the sound discretion of a court of equity requires the court to abstain from exercising its jurisdiction, several factors are considered. First, a federal court will avoid, if possible, a decision on a constitutional question, and secondly, it may refuse a case or postpone its hearing where a question of state law involved in the case has not yet been clearly decided by the state courts. These two factors are generally intertwined—that is, if the question of state law is decided in one way, the necessity of the decision on the constitutional issue is obviated. The federal courts seem to place much weight on the possibility that they might decide the question of state law incorrectly. See *Railroad Commission of Texas v. Pullman Co., supra.* Further, the federal courts may be reluctant to exercise their equitable jurisdiction when the issue is a question of state domestic policy. In the usual case, the state domestic policy is concerned with the problem of developing a uniform system of regulation for a complex local problem by a state administrative agency. See *Burford v. Sun Oil Company,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

Absence of State Court Decisions

In *Chicago v. Fieldcrest Dairies,* 316 U.S. 168, 62 S.Ct. 986, 86 L.Ed. 1355 (1942) and *American Federation of Labor v. Watson,* 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873 (1946), the importance of the second factor is indicated. In the *Fieldcrest* case the court said that in the absence of an "authoritative and controlling determination by the state tribunals" of the construction of the state law, an issue which calls for such a construction by the federal courts should be left to the "more appropriate forum" of the state, "which alone can give a definite answer to the major questions posed." 316 U.S. at 172. The *Watson* case stated that the construction of a state constitutional provision by the federal courts would amount to no more than a "preliminary guess," and should be left up to the state courts.

Avoidance of Constitutional Question

The factor of avoidance of a decision on a constitutional question whenever possible is usually present in the cases where the state law has not been definitely construed by the state court. A good discussion of this factor is found in *Spector Motor Co. v. McLaughlin,* 323 U.S. 101, 65 S.Ct. 152, 89 L.Ed. 101 (1944), where the court said:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that the federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. . . . Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations of local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication." 323 U.S. at 105.

Relationship Between Two Factors

The relationship between the two factors of avoiding constitutional questions and of deferring action where the state statute in question has not been definitively construed by the state courts is further illustrated by *Albertson v. Millard,* 345 U.S. 242, 73 S.Ct. 600, 97 L.Ed. 983 (1953). In that case the plaintiffs, members of the Communist Party in Michigan, sought to enjoin the enforcement of a Michigan statute which purported to regulate the Communist Party and communist front organizations. The question centered around the definitions of the statute with regard to communists and communist front organizations, and the statute had not been construed by the courts of the state. A three-judge federal district court was convened and held that the statute was constitutional. The Supreme Court reversed, applying the doctrine of equitable abstention:

> "Interpretation of state legislation is primarily the function of state authorities, judicial and administrative. The construction given to a state statute by the state court is binding upon federal courts. . . .
>
> "We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action." 345 U.S. at 244-45.

Mr. Justice Douglas dissented on the ground that the statute was clear and unambiguous as applied to the particular plaintiffs, and the questions involved did not turn upon "any niceties in the interpretation of the Michigan law." 345 U.S. at 245.

The Supreme Court has recently indicated the extent to which it will apply these two factors. *Government and Civic Employees Committee, CIO v. Windsor*, 353 U.S. 364, 77 S.Ct. 838, 1 L.Ed. 2d 894 (1957), dealt with the following situation: First, plaintiff sought an injunction restraining the enforcement of an Alabama statute restricting the rights of employees of the state to join and belong to labor organizations, and a declaratory judgment that the statute was unconstitutional. The federal district court, consisting of three judges, held that the doctrine of equitable abstention applied, since the courts of the state had not rendered a definitive construction of the statute. 116 F. Supp. 354 (N.D. Ala. 1953). The Supreme Court affirmed without opinion, 347 U.S. 901, 74 S.Ct. 429, 98 L.Ed. 414 (1954). Then, plaintiff applied to the state courts for relief, but apparently did not present the constitutional questions of freedom of association and expression, contending only that the Act did not cover plaintiff. The Supreme Court of Alabama affirmed a lower court opinion that the union was subject to the terms of the Act. 262 Ala. 285, 78 So. 2d 646 (1955). The plaintiff returned to the federal forum and requested final relief, and the three-judge federal district court held that the statute as applied by the Alabama court was constitutional. The Supreme Court refused to consider the constitutional questions, holding that the doctrine of equitable abstention still applied:

> "We do not reach the constitutional issues. In an action brought to restrain the enforcement of a state statute on constitutional grounds, the federal court should retain jurisdiction until a definitive determination of local law questions is obtained from the local courts. One policy served by that practice is that of not passing on constitutional questions in situations where an authoritative interpretation of state law may avoid the constitutional issues. . . . Another policy served by that practice is the avoidance of the adjudication of abstract, hypothetical issues. . . . The bare adjudication by the Alabama Supreme Court that the Union is subject to this Act does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court." 353 U.S. at 366.

The court ordered that the district court retain jurisdiction until "efforts to obtain an appropriate adjudication in the state courts have been exhausted."

The "time-honored canon" referred to in the *Spector* case, *supra*, has not always been followed, as demonstrated by the decision in *Thompson v. Consolidated Gas Co.*, 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510 (1937). In that case the court affirmed an injunction restraining the Railroad Commission of Texas from enforcing a gas proration order, while admitting that the state statute authorizing the Commission to make such orders had not been construed by the state courts. The factor on which the court relied to distinguish the cases which had refused jurisdiction in similar situations was the existence of a "grave doubt" that the state courts would construe the statute in accordance with accepted constitutional principles. On the other hand, the court has applied the doctrine of equitable abstention even where there was no motivation to avoid a federal constitutional question. *Propper v. Clark*, 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949); *Public Utilities Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 63 S.Ct. 369, 87 L.Ed. 396 (1943).

Non-Interference with Domestic Policy

The third factor, the avoidance of federal intervention with state domestic policy, is illustrated by *Burford v. Sun Oil Company, supra*, and *Alabama Public Service Commission v. Southern Ry.*, 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951). In the *Burford* case, discussed in detail *infra*, the federal courts declined to consider issues involving a specialized aspect of a complicated regulatory system of local law. In the *Alabama* case, however, the question was whether an order of the Public Service Commission requiring the Southern Railway to continue service on a particular line was confiscatory. The majority of the court said:

> "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, in-

tervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that '[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts." 341 U.S. at 349-350.

The court apparently is basing its result on "the usual rule of comity," in order to prevent needless friction in federal-state relations. Mr. Justice Frankfurter concurred in the result, but could not agree with the majority's application of the doctrine of equitable abstention.

Development of the Doctrine of Abstention

Although the doctrine of equitable abstention is of fairly recent origin, the foundation was laid in some early cases which dealt with exhaustion of state remedies. *Gilchrist v. Interborough Rapid Transit Co., supra,* illustrates this fact. In that case plaintiff sought to enjoin the New York Transit Commission from enforcing an order affecting the rates which plaintiff might charge in its intrastate operations. The Commission asserted that it intended to test the rate established "by an immediate, orderly appeal to the courts of the state." 279 U.S. at 211. The Supreme Court, apparently basing its decision on a finding that the contemplated appeal was administrative in nature, refused to exercise its jurisdiction, stating that the intention of the Commission "should not be thwarted by an injunction" issued by the federal courts, and indicating that in withholding its relief, it was exercising its equitable discretion. The use of the court's discretion in habeas corpus proceedings was discussed in *Ex parte Royall, supra.*

Upon this foundation the court proceeded to build the doctrine of equitable abstention. In *Hawks v. Hamill,* 288 U.S. 52, 53 S.Ct. 240, 77 L.Ed. 610 (1933), plaintiff sought to enjoin state and county officials from interfering with an alleged perpetual franchise to operate a toll bridge. Federal jurisdiction was based solely on diversity of citizenship, the complaint asserting no violation of any federal right. The Supreme Court took "an approach along the line of equitable remedies," and, in referring to the district court's order enjoining the state officials from bringing an action in the state courts to determine their right to the bridge, stated:

> "Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of the federal courts in restraint of state officials though the rights asserted by complainants are strictly federal in origin. . . . There must be reluctance even greater when the rights are strictly local, jurisdiction having no other basis than the accidents of residence." 288 U.S. at 61.

Finally, in 1935, the Supreme Court stated the doctrine in clear and unequivocal terms. *Pennsylvania v. Williams, supra.* The federal district court had taken possession of the assets of a building and loan association in equitable receivership proceedings brought by foreign stockholders, and Pennsylvania officers sought to obtain the assets from the federal district court for the purpose of liquidating the association under a comprehensive state statute providing for the liquidation of insolvent building and loan associations. The district court refused to turn over the assets on the ground that it had obtained jurisdiction over the *res* first. The Supreme Court, reversing the district court and indicating that the question was not the ordinary one of comity between the federal and state courts each asserting jurisdiction over the subject matter and the same property, stated the doctrine and the reasons behind it as follows:

> "A court of equity, which in its discretion may refuse to protect private rights when

the exercise of its jurisdiction would be prejudicial to the public interest . . . would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer. It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of the state governments in carrying out their domestic policy. . . . It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control or interference with the internal affairs of a domestic corporation of the state. . . . There are stronger reasons for adopting a like practice where the exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers." 294 U.S. at 185.

The next important development came in 1941, with the decision of the Supreme Court in *Railroad Commission of Texas v. Pullman Co., supra,* a leading case on the doctrine of equitable abstention. In this case the two main factors of absence of a definitive construction of state law by state courts and the reluctance of the federal courts to decide a constitutional question were both present. The state commission had directed that an employee having the rank and position of a Pullman conductor be continuously in charge of each Pullman sleeping car, and the Company brought action in federal court to determine the validity of the regulation, alleging that it was unauthorized by the Texas statutes and violative of the Constitution. Pullman porters intervened, claiming that the regulation discriminated against Negroes. A determination of the issue would require a construction of the state statute, which had not been construed by the state court, and if the regulation were sustained, the court would have to decide the constitutional questions presented. The Supreme Court's opinion declares that "no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination" of the law of the state. 312 U.S. at 499. The court reasoned as follows:

"In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. . . . The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.

". . . These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." 312 U.S. at 500, 501.

Scope of Application

The extent to which the doctrine of equitable abstention will be applied is not certain. It was greatly extended in *Burford v. Sun Oil Company, supra.* The validity of an order of the Texas Railroad Commission, which is charged with extensive regulation of the oil industry, was before the court. Sun Oil Company asserted that the order was invalid because (1) it was not within the scope of the powers authorized by the statute granting the Commission its authority, or (2) it would amount to an unconstitutional confiscation of the Company's property under the Federal Constitution. The court, holding that the injunctive relief should not be granted, first refused to apply the doctrine of exhaustion of state remedies, saying that "no useful purpose will be served by attempting to label the court's position as legislative . . . or judicial." 319 U.S. at 325. Then, it proceeded to hold that the doctrine of equitable abstention required the federal courts to refuse to grant relief. Apparently the conclusion that sound discretion would require the federal courts to withhold their relief was based principally upon the fact that the state statute, limiting all appeals from the orders of the Commission to a particular state court, had been construed to mean that no other state court could review the order, as this "multiple review" would lead to intolerable confusion. "Insofar as we have the discretion to do so, we should leave these problems of Texas law to the state court where each may be handled as 'one more item in a continuous series of adjustments.'" 319 U.S. at 332. In a vigorous dissenting opinion, Mr. Justice Frankfurter, who had been instrumental in developing equitable abstention, criticized the decision as an arbitrary judicial limitation on diversity jurisdiction, in conflict with a deliberate refusal of Congress to impose such limitation by statute.

Whether this precedent will be followed to its full extreme is questionable. In *Meredith v. Winter Haven*, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943), the court limited the *Burford* case to its peculiar facts, pointing out that the doctrine of equitable abstention would be applied only where "some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred . . . would in exceptional cases warrant its non-exercise," and that in all other cases it was the duty of the federal courts to decide questions of state law whenever necessary to the rendition of a judgment. 320 U.S. at 234. However, the Supreme Court has held as recently as 1951 that a federal district court was required by its sound discretion as an equity court to refuse to enjoin an order of a state regulatory agency in the interest of harmonious federal-state relations, even though the applicable state law was sufficiently definite to avoid the objection that the court would be deciding an unnecessary constitutional issue. *Alabama Public Service Commission v. Southern Ry., supra.* Mr. Justice Frankfurter, concurring in the result, objected that the majority was extending the doctrine of equitable abstention to every case which "a state court could entertain." 341 U.S. at 361.

State Criminal Proceedings

In the field of state criminal proceedings, the federal courts have been especially reluctant to interfere. *Beal v. Missouri-Pacific R.R.*, 312 U.S. 45, 61 S.Ct. 418, 85 L.Ed. 577 (1941); *Stefanelli v. Minard*, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951). In the *Stefanelli* case the accused sought to enjoin the use of evidence in a state criminal trial because it was allegedly obtained by unlawful search. The Supreme Court, denying the relief, assumed that power to issue such an injunction existed, but declared:

> ". . . to sustain the claim would disregard the powers of courts of equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the wisdom of using their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States.
>
> ". . . .
>
> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this court, to determine the issue." 342 U.S. at 120, 123.

However, the courts have repeatedly asserted that the prohibition against interference in state criminal prosecutions is not absolute. Rather, the federal courts will refuse to interfere "save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent," *Douglas v. City of Jeannette*, 319 U.S. 157, 163, 63 S.Ct. 877, 87 L.Ed. 1324 (1943), or "on a showing of danger of irreparable injury 'both great or immediate'." *Cooper v. Hutchinson*, 184 F.2d 119, 124 (3rd Cir. 1950).

Abstention in Diversity Jurisdiction Cases

The doctrine of equitable abstention has been applied both to cases in which jurisdiction is based on a federal question and to those in which jurisdiction is based on diversity of citizenship. See *Pennsylvania v. Williams, supra,* and *Meredith v. Winter Haven, supra.* It should be noted, however, that in most cases there has been the added issue of whether the action of a state official was proper.

The cases of *Mottolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949), and *Beiersdorf & Co. v. McGohey*, 187 F.2d 14 (2d Cir. 1951), illustrate the application of equitable abstention in an action between private parties in federal court. In the *Mottolese* case, plaintiff brought a shareholders' derivative action against the directors of a corporation for mismanagement; nine shareholders' suits had been brought and were pending in the state court, all of which were based on the same matter. The federal court, exercising its equitable discretion, granted a stay of proceedings pending the outcome of the state actions. The *Beiersdorf* case was a petition for a writ of mandamus to compel the district judge to hear an action for the infringement of trade-marks, a

breach of contract, and an accounting. The district judge had dismissed the action, apparently on the grounds that his calendar was crowded and that a state action was pending, the defendant in the federal suit having previously brought an action in the state court to obtain a declaratory judgment on the same questions as those presented in the federal suit. The majority of the court of appeals felt bound by the doctrine of the *Mottolese* case, since there was a state action pending. Judge Clark dissented on the ground that such a policy would cede to the district judge "a wide power to pick and choose among cases to be heard federally." He observed that under the earlier rule no such power was possessed by the district judge but that trends to the contrary had developed which recognized the power in certain situations. The situations were identified as:

> ". . . the transfer to a more convenient forum, the refusal of declaratory relief when state jury actions are pending seeking affirmative relief against the federal suitor, and the holding of the federal case for definitive decision of state law by the appropriate state tribunal." 187 F.2d at 16.

Techniques of Applying The Doctrine

Several techniques have been used in applying the doctrine of equitable abstention. The alternatives were stated by Judge Learned Hand in *East Coast Lumber Terminal v. Town of Babylon,* 174 F.2d 106, 109 (2d Cir. 1949):

> "The choice lies between deciding the state issues along with the federal ones; retaining the federal issues undecided until a state court has decided the state issues; and dismissing the action, a course which would deny the whole jurisdiction. There is indeed no insuperable obstacle to the district court's deciding the state issues; and at times that is still permissible in this kind of action. However, there are usually good reasons for not doing so, because the federal court must then decide whether state officials have kept within the limits of their authority; and it is, and should be, an unwelcome duty for an alien tribunal to assume such a function."

In some cases the court has chosen to retain the case until the state issues have been decided. *Spector Motor Service Co. v. McLaughlin, supra; Glen v. Field Packing Co.,* 290 U.S. 177, 54 S.Ct. 138, 78 L.Ed. 252 (1933). In others, the court has completely dismissed the federal suit. *Stainbach v. Mo Hock Ke Loh Po,* 336 U.S. 368, 69 S.Ct. 606, 93 L.Ed. 741 (1949); *Burford v. Sun Oil Co., supra.*

Race Relations and Civil Rights Cases

Federal civil rights legislation authorizes a person deprived of "any rights, privileges and immunities secured by the Constitution and laws" to seek redress in "an action at law, suit in equity, or any other proper proceeding . . . ." 17 Stat. 13 (1871), 42 U.S.C.A. § 1983 (1957). The federal judicial code confers on the federal district courts original and removal jurisdiction in cases based on charges of civil rights violations, 62 Stat. 932 and 938 (1948), 28 U.S.C.A. §§ 1343 and 1443 (1950). However, the courts have not always seen fit to exercise these powers in the breadth of scope conferred by Congress, but rather have followed a practice of discretionary refusal to take jurisdiction when a remedy is available in the state courts. As has recently been observed:

> "It is well settled . . . that accepted principles governing equitable and declaratory relief are no less applicable where such relief is sought under the Civil Rights Act." *Williams v. Dalton,* 231 F.2d 646, 648 (6th Cir. 1956).

In the *Williams* case, plaintiff, claiming to have been committed to a Michigan mental hospital without having been afforded an adequate hearing, sued in the federal district court for declaratory and injunctive relief under the Civil Rights Act. That court found that the state law provided an effective means of testing the legality of plaintiff's committment, and that plaintiff had sought relief under the Civil Rights Act rather than through habeas corpus proceedings in order to evade the requirement of exhaustion of state remedies which applies to the latter type of case. The court of appeals, in affirming the denial of relief, declared:

> ". . . in a related segment of state-federal conflict [that concerning habeas corpus pro-

ceedings], Congress has clearly expressed the policy that persons confined pursuant to a judgment of a state court shall first utilize available state corrective processes before resorting to a federal court to review the validity of the judgment. The statute evincing that policy . . . does not by its terms apply to this case; the policy itself does." 231 F.2d at 649.

Refusal to Abstain in Civil Rights Cases

However, a review of other decisions handed down during the past twelve years indicates that where the federal cause of action is based on a deprivation of a plaintiff's civil rights, the federal courts are not inclined to apply the abstention policy strictly.

In *Stapleton v. Mitchell*, 60 F.Supp. 51 (D. Kan.), *appeal dismissed sub. nom., McElroy v. Mitchell*, 326 U.S. 690 (1945), a special three-judge federal court was asked to enjoin the enforcement of the Kansas Labor Law of 1943, on the ground that it deprived union members of their rights of freedom of speech, press and assembly. Acknowledging that confusion existed in regard to the propriety of the exercise of federal jurisdiction to enjoin the enforcement of state statutes, the court declared:

"It is noteworthy, however, that the 'doctrine of abstention' [citing *Railroad Commission v. Pullman Co.*] was evolved in cases where property rights under the Fourteenth Amendment and not personal rights under the First were the subject of adjudication. . . .

"In sum, it seems fairly plain that . . . the state courts are the preferable forum for the adjudication of the question whether a state statute offends against the Federal Constitution. . . . But, where as here, fundamental human liberties are drawn in issue, the Federal courts are a proper forum for the determination of the question whether a state statute trespasses upon an area which the Federal Constitution has set apart as hallowed ground for expression of democratic ideas. We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." 60 F.Supp. at 54, 55.

The same position was taken in *Alesna v. Rice*, 74 F.Supp. 865 (D. Hawaii 1947) in regard to protection of First Amendment rights. However, the court of appeals disapproved the exercise of jurisdiction by the district court because plaintiff sought an injunction against the prosecution of a criminal proceeding in a territorial court, and the appellate court found no "exceptional circumstances" to take the case out of the general rule of abstention from interference with criminal prosecutions. 172 F.2d 176 (9th Cir. 1949). *Douglas v. City of Jeannette, supra*, was relied on as establishing the principle here applied. More recently, when a voter alleged he was deprived of due process of law and the equal protection of the laws through the refusal of the Hawaiian legislature to reapportion itself to adjust to population shifts, the federal district court in Hawaii granted relief in spite of defendant's objection that the federal court should refrain from interfering with a matter of local law. The court, while recognizing the policy of discretionary refusal to interfere in certain state judicial proceedings, asserted:

"In this situation relief under the Civil Rights Act in a federal court is not dependent upon prior pursuit of redress in a local forum. . . . An exception exists . . . if an interpretation of local law would avoid the constitutional difficulty. If it cannot, the litigant has his choice of forums. . . . It does not matter that a local court could grant effective relief. The plaintiff . . . has not poised a question of interpretation which might cause a discretionary refusal of jurisdiction." *Dyer v. Kazuhisa Abe*, 138 F.Supp. 220, 233 (D. Hawaii 1956).

In a number of cases directly involving the violation of civil rights on the basis of race and color, the lower federal courts have asserted their right to exercise jurisdiction, in spite of the existence of concurrent remedies in the state courts. Thus, relief has been provided against deprivation of the right to vote, *Mitchell v. Wright*, 154 F.2d 924 (5th Cir. 1946); discrimination in salary scales for Negro and white teachers, *Morris v. Williams*, 149 F.2d 703 (8th Cir. 1945); *Mills v. Board of Education*, 30 F.Supp. 245 (D. Md. 1939); discrimination in school

facilities for Negro and white children, *Heard v. Ouachita Parish School Board,* 94 F.Supp. 897 (W.D. La. 1951); segregation of school children of Mexican descent, in violation of California law as well as federal constitutional rights, *Westminster School District v. Mendez,* 161 F.2d 774 (9th Cir. 1947).

School Segregation Litigation

Since the Supreme Court's decision in the School Segregation Cases, the federal courts in California have again been called on to protect school children against racial discrimination.

Romero v. Weakley, 131 F.Supp. 818 (S.D. Calif.) *rev'd,* 226 F.2d 399, 1 Race Rel. L. Rep. 48 (9th Cir. 1956), was a class action on behalf of Negro and Mexican children alleging that rules, regulations and orders of the defendant school board resulted in the segregation of Negro and Mexican children in violation of the Fourteenth Amendment. In the opinion of the district court, the settled principles of avoiding constitutional decisions and of allowing the state courts to make a final determination of the state law involved were applicable to the case at bar. The court held that in order to render a decision on the constitutional question, it would have to interpret the rules, regulations and other orders which were alleged to result in the segregation, and "must construe them and determine as a matter of law if their legal operation and effect truly compel the alleged segregation and discrimination." 131 F.Supp. at 831. In order to avoid deciding the constitutional question and out of a "scrupulous regard for the rightful independence of the state governments," the federal court of equity would exercise its discretion to refuse to grant the relief prayed until the state court had construed the orders and regulations of the school board. The court of appeals, however, found that there were no disputed questions of state law but only a federal constitutional question of fact. The appellate court therefore ruled that the district court erred in refusing to consider the complaint on the ground that the federal court should not exercise its discretion until the federal constitutional question becomes inevitable of decision.

The federal district court of Maryland has also recently decided that in a case involving segregation in the public schools, the fact that plaintiffs might have been able to seek a writ of mandamus in the state courts did not deprive the federal courts of jurisdiction, since in the absence of special circumstances which would justify equitable abstention, the Civil Rights Act specifically grants such jurisdiction. However, the complaint was dismissed with leave to refile, because plaintiffs had not exhausted these state administrative remedies. *Robinson v. Board of Education of St. Mary's County,* 143 F.Supp. 481, 1 Race Rel. L. Rep. 862 (D. Md. 1956). See also *Carson v. Board of Education,* 227 F.2d 789, 1 Race Rel. L. Rep. 70 (4th Cir. 1955).

It cannot be said, of course, that the doctrine of equitable abstention will not be applied in race relations cases. Indeed, two recent race relations cases have turned on its application. *Bryan v. Austin,* 148 F.Supp. 563, 2 Race Rel. L. Rep. 378 (E.D. S.C.), *vacated as moot,* 77 S.Ct. 1396, 2 Race Rel. L. Rep. 777 (1957); *Lassiter v. Taylor,* 152 F.Supp. 295, 2 Race Rel. L. Rep. 832 (E.D. N.C. 1957).

Negro School Teachers

In the *Bryan* case the plaintiffs, Negro school teachers, sought to enjoin the enforcement of a South Carolina statute which prohibited the employment of members of the National Association for the Advancement of Colored People by the state or by local school districts. A three-judge federal district court was convened to hear the case, and after a hearing, each of the three judges entered a separate opinion. District Judges Williams and Timmerman joined together in voting to stay the proceedings, pending a determination of the constitutionality of the statute by the courts of South Carolina. Judge Williams thought that the court had jurisdiction over the cause but that it should refrain from exercising that jurisdiction under the doctrine of equitable abstention. Judge Timmerman, although voting to stay proceedings, did not think that a federal question was presented. Circuit Judge Parker agreed with Judge Williams that the court had jurisdiction, but did not think that the doctrine of equitable abstention should be applied. After stating the facts of the case, Judge Williams said:

> "We think we should use our discretion in refusing to pass on the issues in this controversy at this time. It does not appear that the statute in question has been interpreted by a state court, and it is not proper to pass upon the controversy presented herein until a South Carolina court has first heard the

case and passed upon the constitutionality of the Act in question." 2 Race Rel. L. Rep. at 380.

Relying on *Albertson v. Millard, supra,* and *Government and Civic Employees Organizing Committee, CIO v. Windsor, supra* (the first district court opinion), Judge Williams argued that vagueness in the terms of the statute is not a condition to the application of the doctrine of equitable abstention:

> "It may be true that the statute in question is clear and unequivocal but this does not prevent us from exercising our discretion in requiring that it be submitted to the state court for interpretation. . . . It appears to us that the Michigan and Alabama Acts [involved in the *Albertson* and *Windsor* cases] were clear and free from ambiguity. The Supreme Court, however, held that the district court should refrain from taking any action until the highest state court had passed upon the constitutionality of the Act. The state and federal courts of South Carolina have always worked in perfect harmony. To declare an act of the state legislature unconstitutional should be left to the state court. This, of course, would not apply to statutes and constitutional provisions which have already been declared unconstitutional by the United States Supreme Court in the school segregation cases. We hold that the federal court should stay proceedings and permit the state court to pass upon the constitutionality of the Act in question. It is only by doing this that we avoid conflict between the state and federal courts and preserve harmonious relationships which have heretofore existed between them." 2 Race Rel. L. Rep. at 382.

Judge Parker's disagreement with Judge Williams centered around the question of whether equitable abstention will be applied where the statute in question is clear and unequivocal. He did not think that any construction of the statute by the state court would obviate the constitutional objections:

> "I recognize, of course, that, in the application of the rule of comity, a federal court should stay action pending action by the courts of a state, where it is called upon to enjoin the enforcement of a state statute which has not been interpreted by the state courts, and where the statute is susceptible of an interpretation which would avoid constitutional invalidity. As the federal courts are bound by the interpretation placed by the highest court of a state upon a statute of that state, they should not enjoin the enforcement of a statute as violative of the Constitution in advance of such an interpretation, if it is reasonably possible for the statute to be given an interpretation which will render it constitutional." 2 Race Rel. L. Rep. at 382.

As noted above, the court stayed action pending a definitive interpretation by the state courts. Subsequently, however, while an appeal was pending before the Supreme Court, the South Carolina legislature repealed the act in question.

Lassiter v. Taylor, supra, involved the constitutionality of a North Carolina statute establishing a literacy test to determine if an applicant for registration for voting was qualified. The plaintiff, a Negro woman, contended that the statute was unconstitutional because it was enacted under a provision of the North Carolina Constitution which contained a so-called "grandfather clause." The statute in question had repealed the "grandfather clause" which had previously been found in the statutes of the state. The three-judge federal court which heard the case, in a *per curiam* opinion, stayed action pending an interpretation of the statute and constitutional provisions by the North Carolina courts. The court said:

> "Before we take any action with respect to the Act of March 27, 1957, however, we think that it should be interpreted by the Supreme Court of North Carolina in the light of the provisions of the State Constitution. . . . We think, also, that administrative remedies provided by the act should be exhausted before action by the federal courts is invoked." 2 Race Rel. L. Rep. at 834.

Again the court used the procedure of retaining jurisdiction of the case pending the determination of the state courts, rather than dismissing the case without prejudice.

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